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LABOR RELATIONS AND THE ARMED FORCES AS AFFECTED BY EXECUTIVE ORDER NO. 10988

FRED M. HADEN

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A Thesis

Presented to

The Judge Advocate General's School,
U. S. Army

by

Major Fred M. Haden, USMC

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H1105

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The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. Reference to this study should include the foregoing statement.

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SCOPE

A brief history of labor relations in the United States. An analysis and interpretation of Executive Order No. 10988 emphasizing those controversial matters which have arisen such as: unit determinations, voting, appeal, recognition of employee organizations and the relation between the National Labor Relations Board decisions and the interpretation of the Order. Consideration being given to arbitration decisions, the N.L.R.A., the N.L.R.B. and Federal decision. An analysis of what some of the initial contracts between labor and Armed Forces management have entailed and recommended procedures to be followed by members of Armed Forces management with labor when negotiating.

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CHAPTER I

INTRODUCTION

On January 17, 1962, President Kennedy issued Executive Order 10988[1] on Employee-Management Cooperation in the Federal Service. This order represents a milestone in establishing the rights of government workers to organize without reprisal,[2] to obtain various forms of recognition[3] for their unions, to engage in collective bargaining,[4] and to negotiate signed agreements.[5] For the first time unions are in a position of having, as a matter of law, the right to bargain with management concerning their problems and to take part in formulating and implementing federal personnel policies and practices.

Executive Order 10988 will probably prove to be one of the most significant changes encountered in personnel management in the Federal Government during this era. A union that is exclusively recognized will represent all members in the unit, including those not members of the union or, for that matter, any labor organization.[6] Sources outside the government, arbitrators,

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1. Exec. Order No. 10988, 27 Fed. Reg. 551 (1962) [hereinafter cited as 10988].
2. 10988 § 1a.
3. 10988 §§ 3-6.
4. 10988 § 6a.
5. 10988 § 7.
6. 10988 § 6b.

will make advisory arbitration decisions on election and unit designation controversies.[7] The government employer will find himself sitting down at the bargaining table and listening to his labor counterpart.

The press has hailed it as a framework for a better civil service in the interest of all the citizens of the United States.[8] Unions initially praised it, comparing it with the Lloyd-LaFollette Act of 1912,[9] but have later criticized it for its lack of enforcement machinery and the finality of decision making by the government.[10]

Of all the branches of the government, the one which has had the hardest time adjusting to the order and to whose nature it is most in conflict is the Department of Defense. The soldier is taught to reach quick, decisive decisions with immediate execution of those decisions once they are made. The concept of bargaining with subordinates is against the soldier's very nature. This, of course, is almost an opposite philosophy from collective bargaining. This difference should be kept

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7. 10988 § 11.
8. N.Y. Times, Jan. 20, 1962, p. 20.
9. AFL-CIO News, Jan. 20, 1962, p. 6.
10. Address by A. B. Gretta, Pres. AFL-CIO (1963), to Office of Industrial Relations, Dep't of Navy, Washington, D. C., Government Employee Relations Reps. 4, E(1) 1963 published by Bureau of Nat'l Affairs /hereinafter cited as GERR/.

in mind as it is bound to affect the implementation of the order until such time as the implications of 10988 have had time to become realized and accepted. Because of modern technology, the military commander often finds himself in the position of an industrial manager, and he must then think as a manager to adequately perform his duties. The management-labor relationship is just one more phase of the military industrial complex. There is nothing to indicate unions are not here to stay. In fact, unions have had defense employees as members for years, but they have been dealt with by the government on an informal basis. Now they must be dealt with on a formal basis. The realization that labor unions are now a formal part of government-employee relationships must be met.

To properly deal with the problems generated by 10988, we necessarily must understand the order itself and its related regulations. Of particular importance is an understanding of some of the background; the protection of employees who join unions; types of recognition; to whom recognition is granted; the grievance and appellate process; and the permitted contents of the agreement itself arrived at by collective bargaining.

CHAPTER II

BACKGROUND OF LABOR RELATIONS

A. Development of National Labor Policy

Since the beginning there have been labor problems, and nations as well as societies have been influenced and even destroyed as a result. So long as one man works for another there will be management-labor problems. From the time of the Greeks and Romans history has seen the fight between management and labor transform the lives of the world's inhabitants as a result of the transition from slavery to serfdom to the industrial revolution. Entire concepts of political philosophy have developed, such as communism and capitalism. Certainly labor problems are not new.

Prior to 1930 the law of labor relations was primarily formulated by court decisions from the common law. As labor relations became more complex, it became apparent that legislation was necessary to cope with increasing problems.

In 1932 the Norris-LaGuardia Act,[11] a statute whose main purpose was to prevent federal courts from using injunctions in labor disputes, was passed. Prior to

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11. Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. §§ 101-115 (1932).

this time it had been customary for employers to get injunctions to prohibit employees from striking and taking other types of labor action.

In 1935, the Wagner, or National Labor Relations Act (NLRA), was passed.[12] This is considered to be the basic labor legislation in this country today along with the Railway Labor Act.[13] In essence, both acts ensure the employee and his union the right of collective bargaining with the employer. The NLRA makes it an unfair labor practice not to bargain with employees. In 1947, the NLRA was amended by what is commonly known as the Taft-Hartley Act,[14] and again in 1959 by the Labor Management Reporting and Disclosure Act (LMRDA).[15] The Taft-Hartley Act attempts to put unions on the same footing with management as far as undesirable labor practices are concerned. The LMRDA was a corrective type act, inasmuch as it reaffirmed the policies of the

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12. National Labor Relations Act, 47 Stat. 449, 29 U.S.C. SS 151-168 (1935) /hereinafter cited as NLRA/.

13. Railway Labor Act, 44 Stat. 577, 45 U.S.C. §§ 151-163, 181-188 (1926).

14. Labor Management Relations Act, 47 Stat. 440, 29 U.S.C. §§ 141-197 (1947) /hereinafter cited as LMRA/.

15. Labor Management Reporting and Disclosure Act, 73 Stat. 519, 29 U.S.C. §§ 401-531 (1959) /hereinafter cited as LMRDA/.

previous legislation and attempted to prevent improper practices on the part of labor, management, union organizations, and various labor consultants. The overall Federal policy can be summarized as encompassing (1) industrial peace entailing continued production uninterrupted by strikes and lockouts, (2) collective bargaining to forestall disputes between government and labor, (3) the right of employees to be free from interference in forming their labor organizations and to be free from unethical practices and coercion of unions, (4) the discouragement and discontinuance of secondary strikes and boycotts, jurisdictional disputes and featherbedding based on the theory that the economic consequences are undesirable, and (5) short of compulsory arbitration, every action must be taken to prevent and postpone strikes which impair the health and welfare of the nation.[16] The basis for the above federal legislation is afforded by the commerce clause of the Constitution.[17]

For a quarter of a century since the enactment of the National Labor Relations Act in 1935, it has, in

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16. CCH, 1964 Guidebook to Labor Relations, para. 203.6.
17. U. S. Const. art. 1, § 8.

fact, been the policy of the U. S. Government to encourage workers in private industry to organize for collective bargaining. During this period, trade unions have been established as the recognized representatives of employees in most of the nation's large industrial complexes. Labor-management relations in private industry have reached a high level of complexity and sophistication. They cover an extensive range of subject matter.

B. The Federal Employee Before 10988

Prior to 10988 there was little formal executive or legislative policy on employee-management relations for federal employees. The NLRA specifically excluded government employees from its provisions,[18] and there was no mandatory type of collective bargaining or arbitration. This is not to say that there was no relationship at all, as there was. As early as 1800, organizations of craftsmen were active in industrial complexes such as Naval Shipyards. In 1912, the Lloyd-LaFollette Act[19] was passed which allowed postal employees to become affiliated with outside unions so long as such unions imposed no obligation to strike, or assist in strikes against

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18. NLRA § 2(2).
19. 37 Stat. at Large 55 (1912).

the United States, which practice is still prohibited and is a criminal offense,[20] and the objectives of the union were for the improvement of labor conditions for its members. By implied extension of this Act, it has become an accepted principle that any federal employee has the right to join any employee organization which does not assert the right to strike against or advocate the overthrow of the government. As a result, there were before 10988 some one-half million postal employees and many thousands of Tennessee Valley Authority employees who were union members and enjoyed full-scale collective bargaining with management, and it has worked successfully.[21] Since 1951, the Federal Personnel Manual has contained provisions which encourage government officials to solicit and consider the views of government employees in the formulation of personnel policy.[22] It has only been since 1958, however, that this policy has been interpreted to apply to employer organizations as well as employees generally.[23] It is noted that the above union

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20. 5 U.S.C. 118(p) (1955).
21. TVA had 90% of its employees covered by union contracts prior to 10988. Eighty-nine percent of postal employees were covered. Dep't of Labor Inf. Bull. (June 30, 1962).
22. Task Force Rep., pt. I at p. 4.
23. Ibid.

activity was allowed by the government but not permitted as a matter of right.

The slow and limited progress of government encouragement of consultations with unions within government prior to 10988 make it come as somewhat of a surprise that some 33% of all federal employees, consisting of 762,000 persons, belonged to some type of employee organization.[24] This matched almost precisely the national proportion of organized workers in non-agricultural establishments, exclusive of federal employment, which was 32.4% in 1960. It was a proportion half again as great as the total labor force, in which 23.3% of the workers organized.[25]

The unions government employees belonged to prior to 10988 were in large part the same unions that represented their counterparts in the private sphere. The question immediately arises why so many joined unions when management in many instances would not have any relations with them. It is probably attributable in part

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24. Membership in any employee organization is allowable even though the organization might not have been recognized by a government agency.

25. Rep. of the President's Task Force on Employee-Management Relations in the Fed. Serv. (1961), pt. I, p. 2 /hereinafter cited as Task Force Rep./.

to unions being able to help the government employee through indirection in the form of lobbying and other political maneuvers.[26] As an example, minimum wages were established by law but could be adjusted upward by Agency heads as the result of wages of industry in the local economy.[27] As early as 1861, the unions helped persuade Congress to pass laws basing the pay of certain workers on those wages paid for similar work to non-government workers in the same area.[28] This is the basis for the pay of some 700,000 blue collar workers today. This in effect gave, and still gives, the government employee the benefit of union bargaining in the private sphere.

The unions flooded employees with literature asserting that the unions were responsible for various accomplishments and enlisting membership to enable the program to continue. For example, the AFGE claimed as achievements: "Health and insurance programs with government paying part of premiums; a two-step classified pay increase in 1960; eight classified pay raises between

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26. See A.F.G.E. Pamphlet "AFGE All Sections Are Go. Govt. Employee Directed" (1960).
27. 10 U.S.C. 7474 (1956) (Navy authority).
28. Meyers, Do You Know Labor.

1945 and 1960 totaling 80%; Friday off when a legal holiday falls on Saturday; government financed training programs; increased retirement and survivor benefits," and many others.[29] These things are today realities, but this writer questions whether any union can claim full credit for their achievement. Enough employees were convinced, however, to account for the large percentage of union membership set out above.[30]

Federal employees who had union affiliation before 10988, and today, too, consisted primarily of postal employees and blue collar workers.[31] Most of the blue collar workers are employed in industrial establishments much like those in the private economy and are paid according to rates prevailing at nearby private industry.[32] This percentage is not surprising considering only 41%

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29. See n. 26 supra.
30. AFL-CIO pamphlet, "AFGE Program for Progress" (1959).
31. Task Force Rep., pt. I at 3.
32. 10 U.S.C. § 7474 (1956). This section authorizes the SECNAV, where there is no other law establishing rates for wages, to establish wages as nearly as is consistent with the public interest with those of private establishments in the immediate vicinity. There are similar type regulations for all agency heads.

of federal employees are in the classified service and only a part of these are white collar workers.[33]

Considering arguendo all of the union claims of achievement for government employees before 10988 are true, they were limited compared to what they could do for the civilian counterpart. Even with the limitations, however, the federal employee's lot was tenable. Whereas the unions were continually bargaining with employers for such things as a shorter work day, a five-day week, employee insurance, research of labor conditions, and equitable promotion, all to be furnished by the employer, the federaleemployee already had many of these benefits established by law or regulation. As an example, promotions were determined and based on ability under the Civil Service Merit System. A comprehensive retirement system allowed retirement after as little as five years' service if disabled and at age sixty with thirty years' service. Allowance for paid sick leave and annual leave on a progressive basis depending on time employed, as well as numerous federal holidays, were

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33. White collar workers are normally those persons in civil service in the graded or general schedule who are on salary. Blue collar workers are those workers who are ungraded, not on a salary schedule, but receive wages instead under the crafts' protective and custodial schedule. See 63 Stat. 954; 5 U.S.C. §§ 1091-1153 (1949).

provided for. Group life insurance at low rates was available, as well as disability insurance. Working conditions were continually studied. All of the above and many other protections and benefits were and still are available. All these provisions are reduced to writing in the Federal Personnel Manual, Civil Service Regulations, and other agency directives. Even though these benefits were available, neither the employee or his union representative had any part in their formulation. This of course put the employee in the position of accepting what he was given. Executive Order No. 10988 has at least partially changed this by providing, as a matter of right, for the recognition of unions and their right to be consulted on personnel matters.

CHAPTER III

EXECUTIVE ORDER NO. 10988 - ITS BEGINNING

For many years prior to 1962 it was generally accepted by those in government and labor alike that a "better understanding" of employee management relations was needed.[34] This lack of understanding was surely caused as a result of improper communication between management and labor. This problem became more and more pertinent over the years as the federal government became the largest single employer in the United States.[35] As a result of this situation, on June 22, 1962, President Kennedy appointed a Task Force on Employee Management Relations in the Federal Service. This Force consisted of Arthur J. Goldberg, Secretary of Labor; John W. Macy, Jr., U. S. Civil Service Commissioner; David E. Bell, Director, Bureau of the Budget; J. Edward Day, Postmaster General, and Theodore Sorenson, Special Consultant to the President.

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34. Task Force Rep., p. II at p. 8.

35. In Jan., 1964 the Dep't of Labor estimated that by June 1964 there would be 2,512,400 U. S. civil servants, 1,039,293 of whom would be employed by Dep't of Defense. As of June 1965, there should be 2,511,200 and 1,021,751 in the Dep't of Defense. GERR 20, A3 (1964).

In 1962 some six months were spent by the Task Force holding hearings on the pro's and con's of what should be done to improve relations between government management and labor. Those who testified represented all interests and included union officials, employers, arbitrators, and attorneys. The large majority of those who testified, as well as the Task Force members themselves, had worked for many years with the NLRA.[36] This fact is of importance as such a background could not but have helped influence the thinking and planning that went into the final drafting of 10988. As will be discussed subsequently, this fact, in this writer's opinion, has and will have a major influence on the interpretation and carrying out of the Order.

November 30, 1961 found the Task Force's work completed and 10988 was recommended.[37] Subsequently the President concurred in the recommendation and promulgated

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36. Honorable John W. Macy, Jr., formerly President of Macy's Dep't Stores; Honorable David E. Bell, formerly President, Bell & Howell Optical Co.; Honorable Robert F. MacNamara, formerly President, Ford Motor Co.; Honorable J. Arthur Goldberg, formerly General Counsel, AFL-CIO Industrial Dep't; Honorable J. Edward Day, formerly Solicitor, Prudential Life Ins. Co., and Theodore C. Sorenson, attorney and politician.

37. Letter from President's Task Force on Employee-Management Relations in Fed. Serv. to President of United States, Nov. 30, 1961.

10988 by the authority granted him by the Constitution of the United States.[38] Section 13(G) of 10988 called for the implementation of a Federal Employee Management Relations Program. On May 21, 1963, President Kennedy issued for application to all agencies covered by 10988 the Standards of Conduct for Employee Organizations[39] and The Code of Fair Labor Practices in the Federal Service.[40] The Code created employee rights in excess of those specifically granted by section 1 of 10988 and the Standards enumerated the position the employee must maintain. They, in effect, set out the detailed operating instructions for the Order.

Since the inception of the Order, the question of its Constitutionality has been raised by the National Federation of Government Employees (NFGE), an independent conservative union which has filed suit in the Federal

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38. U.S. Const. art. II.

39. Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, pt. B, Code of Fair Labor Practices, 28 Fed. Reg. 5127 (1963) /hereinafter cited as Standards/.

40. Standards of Conduct for Employee Organizations and Code of Fair Labor Practices, pt. B, Code of Fair Labor Practices, 28 Fed. Reg. 5129 (1963) /hereinafter cited as Code/.

District Court in Washington, D. C.[41] The complaint specifically alleges 10988 exceeds the authority the President has under any law or statute in force. Accordingly, injunctive relief has been requested. It is further alleged that 10988, Section 6, as interpreted by the Secretaries of the Navy[42] and Defense,[43] is in violation of the first amendment insofar as the membership is unable to select spokesmen of their choice, namely supervisory personnel. Supervisory employees are prohibited from holding office, though they may be members of the organization. It would appear that the President is within his authority inasmuch as 10988 is no more than an order concerning the administrative function of government. As to supervisors holding office in the union, it would certainly be an unbearable impasse because of the conflict of interest that would result in management

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41. Nat'l Fed'n of Fed. Employees [hereinafter cited as NFFE], an unincorporated ass'n, and Annapolis Local 124NFFE and Leonard A. Ruggiero v. Paul H. Nitze, SECNAV and Robert S. MacNamara, Sec. of Defense, and F. H. Huron, Capt USN, in U.S. Dist. Ct., Dist. of Colom. Civil Action No. (1964).

42. Navy Civilian Personnel Instructions 5(3)E [hereinafter cited as NCPI].

43. Dep't of Defense Directive 1426.1, IV, H(1) (June 15, 1962) (superseded by Dep't of Defense Directive 1426.1 V (18 Aug. 1964) [hereinafter cited as DOD 1426.1].

dealing with itself. As early as 1939 the Department of the Navy was confronted with supervisors taking an active part in union activities. The problem arose between the International Association of Machinists (IAM) and the Norfolk Navy Yard. The result was a directive prohibiting the practice.[44]

In conclusion, it should be noted that since its inception the growth in membership in unions under the provisions of 10988 has been impressive and continuous. For the period January 1962 through May 1964, employee organizations have gained exclusive recognition for 244,000 employees, excluding Post Office workers, who have 490,000 members in 22,892 units. Within the defense establishment, the Army has granted exclusive recognition to 95 units, the Air Force 12, the Navy 140, and the Department of Defense 2.[45] The AFL-CIO has predicted 70%-90% of some 800,000 per diem blue collar workers will be organized by 1966.[46] Beyond any question, 10988 has been born and has a full life ahead.

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44. SECNAV Dir. 721 (1939).
45. GERR 39, C1 (1964).
46. Weekly Fed. Employees Digest, vol. 13, 35 (1964).

CHAPTER IV

ORGANIZING RIGHTS

A. Protection of Members

Since the inception of 10988, federal employees have been protected in their right to exercise freely without penalty, fear, or reprisal, the right to join or assist any employee organization or, conversely, not to join if they see fit.[47] The freedom of employees to assist such organizations is formally recognized as extending to participating in the organization and acting for it in its relations with management. The head of each executive department or agency is directed to take appropriate action to see that federal employees under their jurisdiction are afforded these rights, that no interference, restriction, coercion, or discrimination is practiced and that nothing is done to encourage or discourage membership in employee organizations.[48]

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47. 10988 § 1.

48. Task Force Rep. pt. II, p. 12-13. The drafters indicate those roles laid down by Congress for employee-management relations in the private economy should be carried over to the federal government in order to ensure that the public interest and the interest of individual employees are protected. It was felt that there were many areas in the federal government where civil servants have shown little or no inclination to join employee organizations nor enter into collective (continued)

Employee participation in an organization will not exclude them from acting as officers in such an organization.[49] They may not participate as officers, however, if it would result in a conflict of interest causing incompatibility with their official duties.[50] The government as well as the union is entitled to some protection. This restriction would not, of course, apply if the unit were a supervisory unit.

One controversial restriction on management during the period of organization is the restriction on expressing their opinion to the employees. Management must be careful in the pre-election stage to avoid any act that might express their like or dislike for unions. Statements made in public or through news media which might so much as infer a preference must be avoided. As an example, labor leaders on occasion have invited management officials to debate the pro's and con's of union organization at open meetings, which of course would disclose management's position and might influence prospective

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48. (Continued) relationships with management officials. Thus the right of the employee to join or refuse to join should be protected. There should be no compulsion in either direction.

49. DOD 1426.1 V,A (1964).

50. 10988 § 1(b); DOD 1426.1 V I(3) (1964).

union members in their decisions. This might be fatal. It is not a question of what management actually thinks, but what prospective union members think they think. The object is to keep the atmosphere pure. On the other hand, the agency head must see that all of his employees are made aware of their rights under the provisions of 10988. Under no circumstances are any employees to be criticized or have their status in any way affected because of their association with a labor organization. This philosophy has been so closely followed that where a forged newspaper article was published with false information about the union prior to the election and the union subsequently lost, a new election was ordered.[51] This was so even though it was conclusively shown that the government did not release the article and was, in fact, ignorant of its release. Government employers must maintain strict neutrality in speaking to their employees concerning union representation. In the private sphere, Section 8(c) of the Taft-Hartley Act allows the employer to express his opinion to his employees as long as it does not involve a threat of reprisal, force or promise of benefit.

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51. Pensacola Naval Air Station, GERR 40, (ARB) 39 (1964).

This gag restriction on government management, as opposed to the civilian philosophy, is not desirable and should be removed. The restriction in itself infers that government management is not to be trusted with their employees to the degree their civilian counterparts are. This is certainly in conflict with 10988's general tenor of protecting the employee from embarking on a venture he does not understand. It appears inequitable to let unions present all their arguments as to the good of unions and not allow management to present their position, where appropriate. If this restriction on management were removed, the union could still appeal under Section 11 if it believed management's actions caused the election to be unfair, just as they can now on other election and unit controversies. The standards for arbitration of election controversies under 10988 are considered higher than those under the NLRB under the present practice, because of management not being able to speak.[52] The NLRB criteria would appear adequate. The NLRB stated, in Lane Drug Stores, Inc.[53] and in Bloomingdale Brothers,[54] "the test is whether the conduct charged

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52. Id. at 41.
53. Lane Drug Stores, Inc., 88 NLRB 584 (1950).
54. Bloomingdale Brothers, 87 NLRB 1326 (1949).

against the employer was reasonably calculated to interfere with the employee's free choice." This test, with a careful examination of the facts to determine if there were any threats of reprisal or force, or promise of benefit, appears to the writer to be a proper criteria for 10988 practice.

Generally speaking, the right of employees to organize can proceed unrestricted and management will do nothing to discourage it.

B. What Is An Employee Organization?

An employee organization has been defined under 10988 as:

> Any lawful association, labor organization, federation, council or brotherhood having as a primary purpose the improvement of working conditions among federal employees; and any craft, trade or industrial union whose membership includes or is open to both federal employees and employees of private organizations. This shall not include any organization (1) which asserts the right to strike against the Government of the United States or any agency thereof, or to assist or participate in any such strike, or which imposes a duty or obligation to conduct, assist, or participate in any such strike, or (2) which advocates the overthrow of the constitutional form of Government in the United States, or (3) which discriminates with regard to the terms or conditions of membership because of race, color, creed, or national origin,55 or (4) which is determined by the Secretary of

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55. 10988 § 2.

> Defense, after consultation with the national office of a union, if any, of the employee organization concerned, to be subject to corrupt influences or to the influence of any party, movement, or other group which is opposed to basic democratic principles."[56]

Certain groups of government employees are not allowed to unionize, such as the Federal Bureau of Investigation, the Central Intelligence Agency, or any other agency whose primary duty is to perform intelligence, investigative or security functions.[57] Within the Department of Defense this would include such agencies as the Defense Intelligence Agency.[58] In addition, those employee organizations composed predominantly of non-United States citizens located outside of the United States are excluded from organizing.

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56. 10988 § 3.
57. 10988 § 16; DOD 1426.1 B1 (1964).
58. DOD 1426.1 III B1 (1964).

CHAPTER V

WHAT IS A UNIT?

A. Basic Criteria

Interwoven with the unit problem is the question of recognition, which is discussed subsequently in Part VI. For the purpose of this discussion, it is necessary to realize that there are four types of recognition: informal, formal, exclusive, and national. Formal, exclusive, and national recognition can be granted only after a determination of what constitutes a unit. This is so for formal recognition, as there can be no formal recognition unless 10% of the unit are members of the organization. Even though the formally recognized organization only represents its own members, the membership must be a representative group within the unit. The unit must be determined before exclusive recognition is granted because such a union represents all in the unit, and the number of votes or proven membership necessary for recognition is based on a percentage of the unit. National recognition does not even become an issue until large numbers have been granted formal or exclusive recognition.//

Inasmuch as the unit controversies are between the agency and union, an examination of what the agency is is necessary. In the past two years, much conflict has revolved around the definition of the word "agency." Section 1A of 10988 states, "The head of each executive department and agency (hereafter referred to as an agency) shall take such action consistent with law . . . etc." Section 6B states in part, "The agency and subject employee organizations, through appropriate officials . . . etc." The controversy has arisen as to who the agency is, the installation or the appropriate department. Arbitrator Charles O. Gregory, in an arbitration decision between the Naval Ammunition Depot, Saint Julien's Creek, Portsmouth, Virginia, and the International Association of Machinists (IAM), and the American Federation of Government Employees (AFGE),[59] considered the definition of the word agency. Professor Gregory stated that, in his opinion, the agency involved was not Saint Julien's Creek Ammunition Depot, but the Department of the Navy. Throughout the decisions this definition has been followed.[60] The Civil Service

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59. U.S. Naval Ammunition Depot, St. Julien's Creek, Portsmouth, Va., GERR 1, (ARB) 1 (1963).

60. Long Beach Naval Shipyard, GERR 5, (ARB) 39 (1963); Norfolk Naval Shipyard, GERR 6, (ARB) 43 (1963); Boston Naval Shipyard, GERR 9, (ARB) 69 (1963); Puget sound Naval Shipyard, GERR 7, (ARB) 47 (1963).

Commission,[61] and the Department of Defense,[62] have further agreed with this definition.

A unit has been defined as "a grouping of employees for purposes of formal or exclusive recognition. A unit may be established on organization, occupational, or functional lines depending upon what in a particular situation constitutes a clear and identifiable community of interest among the employees involved."[63] Units will be established on a basis which will insure a clear and identifiable community of interest among the employees concerned. The determination as to whether a clear and identifiable community of interest exists is necessarily a flexible one and must be made in light of specific circumstances. In making such determinations, factors such as organizational structure, which is the degree to which a managerial executive has control of and authority to act on negotiable personnel matters, similarity of skills, distinctiveness of function, and integrated work process should be considered.[64] Although functionally

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61. FPM, ch. 711-3, 1(3).
62. DOD 1426.1, VII, A (1964). The final determination of unit designation rests with the agency head.
63. Id. at VII, B.
64. U.S. Naval Air Station, Oceana, Va., GERR 11, (ARB) 81 (1963).

distinct organizational units exist which may be established as separate units, the existence of an integrated work group may make it more practicable to have one large unit than a number of separate units.[65] The Department of Defense has directed that the final determination in controversies over exclusive recognition is the responsibility of the Secretary of Defense or the appropriate Secretary of the military department concerned.[66] In the event that there is a controversy over the unit determination, provision has been made in 10988 to request the Secretary of Labor to appoint an arbitrator to make an advisory opinion.[67]

B. Determination Problems

It would seem that little difficulty should arise in making unit determinations. This has not been the case. A large number of the arbitration decisions under Section 11 have revolved around installations within various agencies denying more than one unit on an installation. These determinations by the commanding officers of the various installations have been forwarded to

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65. DOD 1426.1, VII C (1964).
66. Id. at VII B.
67. 29 CFR 25 (1963); 10988 § 11.

the appropriate agency head, who has upheld them. These have resulted in appointment of arbitrators under Section 11 of 10988.

In the Long Beach Naval Shipyard decision,[68] the shipyard commander's position and the position taken by the Department of the Navy was that the only appropriate unit of the shipyard was a unit consisting of all its employees. Similar craft units or other functional units were alleged to be not appropriate for lack of a clear and identifiable community of interest distinct from those of all other shipyard employees. The American Federation of Technical Engineers, Local 174 (AFTE), had petitioned the commander of the shipyard seeking exclusive recognition pursuant to Section 6 of 10988 as the representative of a unit of technical employees employed by the shipyard. The arbitrator held that all professional, technical employees, draftsmen, equipment specialists, contract specialists, quality control specialists, illustrators, and other technical employees listed could constitute a separate appropriate unit for the purpose of exclusive recognition under 10988. Further, professional employees, including architects,

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68. Long Beach Naval Shipyard, GERR 5, (ARB) 39 (1963).

engineers, chemists, mathematicians and metallurgists, could be included in the unit if they consented. The position of installation commanders was that it is desirable to have only one unit on an installation inasmuch as it is easier to deal with one organization than many, and it would interfere with installation community of interest if more than one unit were on an installation.

The Fort Benning, Georgia, arbitration[69] was the first Army case where the unit question was arbitrated. The Army contended that since 10988 states that a unit may be based on a plant or installation, a craft, or a function, there was no need to further explore any "community of interest" since the community of interest existed by definition in 10988. They further argued that once a unit is proposed on one of the above three bases, it has a built-in community of interest which is clear and identifiable, making such a unit intrinsically appropriate. Arbitrator Roger Williams held that their interpretation was incorrect, as the Executive Order did not intend that there could be only one appropriate unit.

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69. U.S. Army Infantry Training Center, Ft. Benning, Ga., GERR 2, (ARB) 9 (1963); Boston Naval Shipyard, GERR 6, (ARB) 43 (1963).

If the requirements were met it merely indicated that that particular unit was appropriate, but there could be others.

In the Navy, the Bureau of Ships in general has adamantly refused to grant unit recognition to any individual union other than activity-wide units at naval shipyards. The decisions at the Naval Shipyards at Norfolk,[70] Boston,[71] Long Beach,[72] Portsmouth,[73] and Puget Sound[74] are examples. The arbitrators found in these cases that separate units should be recognized and the Navy's position of activity-wide units was overruled. This same decision has been followed in numerous other cases where installation commanders attempted to establish station or activity-wide units.

Arbitrator Roger Williams, in discussing Section 6A of the Order, states that the test for the appropriateness of a unit under 6A in considering the language "units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the

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70. Norfolk Naval Shipyard, GERR 9, (ARB) 69 (1963).
71. Boston Naval Shipyard, GERR 00, (ARB) 1 (1963).
72. Case cited note 23 supra.
73. Portsmouth Naval Shipyard, GERR 15, (ARB) 10 (1963).
74. Puget Sound Naval Shipyard, GERR 7, (ARB) 47 (1963).

employees concerned . . ." indicates to him that the interpretation should be "an" appropriate unit rather than "the" appropriate unit.[75] This further establishes the concept that an automatic installation-wide unit was not intended under 10988. There have been some exceptions.[76] In the Saint Julien's Creek decision, the issue presented was whether the unit determination should be for the depot as a whole or two units, one consisting of graded employees and the other, ungraded. Saint Julien's Creek being a Naval Ammunition Depot, it was held that there was not a readily identifiable division of interest between the graded and the ungraded employees at the Depot. The graded and ungraded employees worked directly alongside one another and the entire group was so interwoven and had such a common objective of industrial interest for producing and supplying adequate ammunition to the Navy that they were inseparable, both in their common relationships to the object for which the ammunition depot exists and their mutual employment interests. Accordingly, Mr. Gregory recommended that there be only one unit at this particular installation.

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75. Post Eng'r, Ft. Benning, Ga., GERR 2, (ARB) 14 (1963).
76. U.S. Naval Ammunition Depot, St. Julien's Creek, GERR 1, (ARB) 1 (1963).

In the George C. Marshall Space Flight Center decision,[77] Arbitrator Marshall decided against a separate unit for the IAM in favor of an installation-wide unit. He stated that the mission of the Apollo program of landing an American on the moon in this decade is an integrated program entailing building rockets and thus all concerned had a common interest. The Gregory and Marshall decisions are the only cases in the military sphere where separate units have not been granted by advisory decision.[78] These cases point out that it is possible to have a single installation-wide unit recommended by an arbitrator depending upon the individual circumstances, even though as a normal rule this has not been done. This is not to imply that there are not many installation-wide units, as there are, but they are in those installations where neither the union nor the government requested arbitration. An installation-wide unit, of course, is desirable to the government, as they only have one

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77. George C. Marshall Space Flight Center, GERR 30, (ARB) 27 (1964).

78. A search of advisory opinions and contracts to date has shown no case where the recommendations of the arbitrator have not been followed by the agency. This indicates that so-called "advisory opinions" have become defacto opinions.

union to deal with. As a result of this apparent misunderstanding of the Order as far as unit determinations are concerned, a memorandum was issued by the Assistant Secretary of Defense, Norman S. Paul, clarifying Department of Defense Directive 1426.1 (1962) in regard to recognizing official units.[79] The memorandum made it quite plain that the intent of 10988 as to unit determinations under the Executive Order, and the Department of Defense Directives, was one of flexibility dependent upon the specific facts in a particular case, and no general rule was to be predetermined nor any particular type of unit prevented by an agency or installation. Also, there could be no limit set on the number of appropriate units which could be established at any installation,[80] or any limit on the number of persons in a particular unit.[81]

At one time, the NLRB position was that the interests of technical employees were so different from those of production and maintenance that they would automatically

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79. Memorandum of Norman S. Paul, Assistant Secretary of Defense, Manpower to Secretaries of Army, Navy, Air Force (Dec. 21, 1962).

80. Morand Bros. Beverage Co., 91 NLRB 409 (1950); Edwards Air Force Base, GERR 30, (ARB) 37 (1964).

81. Ibid. Edwards Air Force Base.

be separate for unit purposes.[82] In 1961, the NLRB decided automatic rules were basically poor and that each case should be independently considered, based on the parties' desires, skills, functions, supervision, and contact with other employees.[83] This, in effect, is the position Mr. Paul has adopted and what he has set forth in his memorandum as cited. The language in the Sheffield Corp. Case[84] and Mr. Paul's are almost identical.

C. NLRB Influence

The closest 10988 comes to being regulated by the decisions of the NLRB are those cases where unit controversies concerning exclusive recognition or election proceedings are involved. The Secretary of Labor, as directed by 10988,[85] nominates arbitrators when requested by employee organizations or agencies from the national panel of arbitrators maintained by the Federal Mediation and Conciliation Service.[86] The expense is borne equally

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82. Litton Industries of Maryland, Inc., 125 NLRB 722 (1959).
83. Sheffield Corp., 134 NLRB 1101 (1961).
84. Ibid.
85. 29 CFR 25 (1963); 10988 § 11.
86. 29 CFR pt. 25, § 25.5 (1963).

by the parties.[87] The very fact that the arbitrators are appointed from the national panel of arbitrators is in itself indicative that their decisions might be influenced by the decisions of the NLRB. This becomes a stronger possibility when a list of some of the persons who have been appointed arbitrators is examined and it is recognized that they normally arbitrate disputes over contract interpretation and unit and election disputes in the civilian sphere.[88]

It is the opinion of this writer that as of this date a realistic approach to unit disputes should be a recognition that arbitrators follow the decisions of the NLRB as concerns unit determinations. Though most of the arbitrators, in their decisions, have been careful to pay lip service to the fact that the decisions of the NLRB are not binding on the interpretation of 10988, they nevertheless state that they are very pertinent and go so far as to cite NLRB cases as a basis for their decision.[89] Some examples of arbitrators' positions are

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87. 29 CFR pt. 25, § 25.7 (1963).

88. Charles Gregory, Phillip Taft, Cornelius Peck, Ralph Valtin, Paul Prasow.

89. Naval Research Lab., GERR 10, (ARB) 77 (1963); Long Beach Naval Shipyard, GERR 5, (ARB) 39 (1963); Boston Naval Shipyard, GERR 6, (ARB) 43 (1963). A search of the arbitration to date discloses no case where the arbitrator has stated he was bound by NLRB decisions.

the Naval Research Laboratory arbitration decision,[90] made by Rolf Valtin. He stated:

> "I do not consider myself bound by past unit determinations by the NLRB, but the distinction which the Board has made between blue collar and white collar employees is such a classic one, and one that is nowadays so widely accepted, that I do not see how it can be reasonably cast aside."

Harold W. Daney, in the U. S. Army Rock Island Arsenal decision,[91] stated:

> "This is not an NLRB proceeding, but a proceeding under Executive Order 10988. The arbitrator derives his authority from appointment pursuant to said Order and is bound by its terms. To stress this basic fact is not intended to derogate from the importance or pertinence of NLRB policies on unit issues as they may be relevant to this proceeding."

Hugo P. Black, Jr., in the Pensacola Naval Air Station decision,[92] used the NLRA as a guide to determine what standard of "purity" should be used in determining the standard for elections. He said the government standard should be at least as high as private industry under NLRB. Edward R. Teple, in the Wright-Patterson Air

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90. Naval Research Lab., Washington, D. C., GERR 10, (ARB) 77 (1963).
91. U.S. Army Rock Island Arsenal, GERR 18, (ARB) 1 (1964).
92. U.S. Naval Air Station, Pensacola, Fla., GERR 40, (ARB) 39 (1964).

Base decision,[93] made a comparison between safety features set out under Section 9b(3) of the Labor Management Relations Act for the private sphere with the Government's responsibility, and stated: "The arbitrator fails to see any distinction between government operation and the conduct of private business in this respect." Alpheus R. Marshall, in the George C. Marshall Space Flight Center decision,[94] stated that NLRB decisions should be persuasive as to the interpretation of 10988 though not necessarily controlling. Mr. Marshall then forthwith cited the Boeing Aircraft Co.[95] decision for the proposition "the manufacturing of missiles is so complex as to make comparison with ordinary manufacturing plants misleading." This he used in deciding there should not be a separate unit recognized at the NASA installation.

To further emphasize the reliance with which the arbitrators appointed by the Secretary of Labor are influenced by the NLRB, the following language reveals Arbitrator Cornelius J. Peck's views on this subject, as stated in the Long Beach Naval Shipyard decision:[96]

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93. Wright-Patterson Air Force Base, GERR 40, (ARB) 44 (1964).
94. George C. Marshall Space Flight Center, GERR 30, (ARB) 27 (1964).
95. Boeing Aircraft Co., 14 NLRB 103 (1955).
96. Long Beach Naval Shipyard, GERR 5, (ARB) 39 (1963).

"A reading of the Executive Order soon reveals that it is patterned after the National Labor Relations Act. The 'recognition' and 'appropriate unit' referred to throughout the Order obviously have their origins in that Act. Section 6 of the Order utilized terms that have become intimately familiar to practitioners of the labor law: 'exclusive representative,' 'has been designated or selected by a majority of the employees', and the following:

> 'Units may be established on any plant or installation which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.'"

Peck emphasizes that the provisions of Section 6(1)(4) of 10988 coincide with the provisions of Section 9(b)(1)-(3) of the NLRA. He then stated:

> "It is apparent, therefore, that the Order describes its substantive mandates in broad terms and that those terms incorporate the broad body of experience developed under the NLRA since 1935. The decisions of the NLRB are therefore highly relevant with respect to unit determinations made under the Order."

Finally as late as January 1965, in the U.S. Marine Corps Air Station Cherry Point, N.C. decision,[97] Arbitrator George Savage stated:

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97. U.S. Marine Corps Air Station, Cherry Point N.C. and IAM, 98 NAV-BUWEPS-13 (Jan. 1965).

> "Sweeping aside any obligation to be bound by Board decisions, it is obvious no informad arbitrator is going to be unmindful of the principles and policies hammered out by the NLRB in the thirty years of experience in determining appropriate units. And no one seeking to be informed on doubtful points will ignore such a wealth of material. . . ."

In view of the above decisions, there can be little doubt that arbitrators are using NLRB decisions as a basis for their decisions under 10988. This being the case, some consideration should be given to NLRB decisions in connection with unit controversies.

D. Some Pertinent NLRB Unit Decisions

Any attempt to discuss and cite all the NLRB decisions cited by arbitrators in the advisory opinions under 10988 would, of course, be futile. Some of the key decisions and their basis are deemed appropriate and informative to better understand their effect on 10988, Section 11 decisions. Under the NLRA, it is most common for questions to arise in considering unit determinations as to whether a particular craft or trade should be granted recognition.

In the Long Beach Naval Shipyard[98] decision, Arbitrator Peck made an analogy between Shipyard commanders

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98. Ibid.

denying recognition other than to an installation-wide unit and the position of the NLRB shortly after the passage of the Taft-Hartley legislation. He pointed out that at that time the NLRB in some instances said the crafts were not separable because the already established stable bargaining relationship overcame the benefits that would be derived from the severance. This position was adopted for the steel industry in 1948,[99] the aluminum industry in 1950,[100] the lumber industry in 1949,[101] and the wet milling industry in 1948.[102] This situation was not completely analogous to the Shipyard commanders' position, as in the Shipyard cases it was not a question of craft severance, but one of initial recognition. The facts in the American Potash and Chemical Corp. case[103] decided by the NLRB in 1954 are more analogous to initial recognition. That case held that prior policy against craft severance would be limited to the industries previously designated, and that in all future cases it would find the craft

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99. Nat'l Tube Co., 76 NLRB 1199 (1948).
100. Permanenta Metal Corp., 89 NLRB 1076 (1949).
101. Weyerhauser Timber Co., 80 NLRB 362 (1948).
102. Corn Products Refining Co., 80 NLRB 362 (1948).
103. Am. Potash and Chem. Corp , 107 NLRB 1418 (1954).

unit appropriate for severance where a true craft unit was sought by a union which traditionally represented that craft.

Congress, in 1959, when it passed the Labor Management Report and Disclosure Act, making substantial revisions in certain portions of the NLRA, made no change in those sections pertaining to unit determinations which, in effect, put its stamp of approval on the methods used by the NLRB in making a unit determination. Even when considering American Potash, the facts are not completely analogous, as in that case a severance is being dealt with. However, the fact that the NLRB will allow crafts to be severed from already established units is a more drastic step than an initial recognition of a craft. There would, therefore, appear to be no sound logic in not recognizing a craft initially and using the American Potash series of cases as authority. A late example of the application of the American Potash rationale can be found in the U. S. Marine Corps Air Station decision,[104] decided on January 21, 1965. Arbitrator George Savage King, in deciding to grant an initial craft recognition, stated:

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104. Note 98 supra.

> ". . . he is in accord with NLRB cases which have held that proof of a true craft unit is proof of community of interest. This is because by definition a true craft includes those criteria used to determine community of interest."

Arbitrator Savage, previous to the above quotation, where reference is made to "NLRB cases," had discussed at length Potash and related cases, recognizing that they were severance cases as distinguished from cases of initial recognition. Nevertheless, he used the principles set forth therein as a basis for unit determination. It can be expected in the future that crafts will be asking for severance from larger units, and there can be little question but that the severance will be granted.

A clear example of craft unit recognition can be found in the case of the pattern makers.[105] Pattern makers have long been recognized as a special craft and they have maintained an organization going back to the 19th century, to which a large part of the practitioners of the craft can trace their ancestry.[106] It has been

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105. Pattern makers cut patterns and make models using both wood and metal. They are few in number, and some units have only several members. Charleston Naval Shipyard, GERR 39, C8 (1964). Portsmouth, New Hampshire Naval Shipyard, GERR 39 (C-9) (1964) [16 members].

106. Am. Potash and Chem. Corp., 107 NLRB 1418 (1954). Craft is defined as a distinct and homogenous group of skilled journeymen working as such together with their apprentices and/or helpers.

argued on occasion that pattern making is an apprentice trade, and that the work of the craft is carried on successfully by pattern makers and their helpers.[107] Once again the NLRB, in the American Potash decision, stated that craft units are severable from industrial type units and the community of interest of the craft group outweighs the community of interest with all workers employed. This was further confirmed in the Kennecutt Copper Corporation case.[108] Where a true craft group is sought, and in addition the union seeking to represent the craft has a history of representing such a craft traditionally, there should be a severance and the craft recognized if NLRB decisions are followed. This would be particularly true where an initial determination is being made. This has been almost consistently done in advisory arbitration of decisions under Section 11 of 10988.[109] The only decision to the contrary as to craft units is that decided by Lawrence R. Seibel in the David Taylor Model Basin decision,[110]

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107. Puget Sound Naval Shipyard, GERR 7, (ARB) 53 (1963).
108. Kennecott Copper Corp., 138 NLRB 118 (1962).
109. Long Beach Naval Shipyard, GERR 5, (ARB) 39 (1963); Am. Potash and Chem. Corp., 107 NLRB 1418 (1950).
110. David Taylor, Model Basin, GERR 7, (ARB) 51 (1963).

and this decision might be distinguished upon the ground that in that case the metal trades counsel did not seek to represent model makers who worked with metal, though the skills of the employees in the unit sought were only slightly greater than the metal model makers. Arbitrator Seibel further noted that though he did not recognize a unit of model makers (non-metal) for the purposes of exclusive recognition, he suggested that such a unit might be afforded formal recognition under 10988, Section 5A. This would afford them a right to be heard. He made it clear that he was not attempting to force the model makers (non-metal) to join the Metal Trades Counsel, which was to be afforded exclusive recognition for ungraded blue collar workers, but they could if they were determined to be a part of the bargaining unit.

E. Basis of Section 11 Arbitration to Date

From a study of the cases to date the rationale of the arbitrators in arriving at their recommendations has been generally similar in all cases. They have looked toward the clear and identifiable community of interest among the employees concerned. They have reasoned that units which could demonstrate a community of interest, such as craft groups, would be adequate. In making this determination, they have considered the NLRB decisions

as well as other 10988 arbitration decisions in determining similarity of working conditions, skill and education, geographical location of the work site, common supervision, and integration of the work process within the proposed unit. Of course, in each case all of the above criteria were not necessarily conclusive, but were usually considered. The decisions now make it clear that the agency argument of only one formally recognized unit per installation because of a common installation-wide community of interest is not sound. This has been further clarified by the Department of Defense as late as 18 August 1964.[111]

Considering both the 10988 decisions and NLRB decisions, various categories of crafts or trades have been recognized as being separable for unit purposes and formal recognition. Clerical employees can normally be represented as a separate unit if they so desire,[112] though usually they will be included in production and maintenance units; guards,[113] painters,[114]

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111. DOD 1426.1 VI (1964).
112. Donovan Constr. Co., 105 NLRB 704 (1953); Penn. Dixie Cement Corp., 107 NLRB 251 (1953).
113. Mack Mfg. Corp., 107 NLRB 289 (1953); AFGE Lodge 431; U.S. Army Armory, Springfield, Mass., GERR 39 C5 (1964).
114. Bhd. Painters, Decorators and Paperhangers, Local 1632 AFL-CIO, Ft. Meyer, Va., GERR 39, C-3 (1964).

firefighters,[115] electricians,[116] toolmakers,[117] lithographers,[118] commissary store employees,[119] inspectors,[120] ships crew,[121] steward officer,[122] ungraded employees,[123] and many others too numerous to mention.

Though there is a restriction on more than one organization having exclusive recognition within a single unit, under 10988 there can be an indefinite number of units within the installation having exclusive recognition. Conceivably all of the above units could be on a single installation. There have been occasions where a single arbitration decision has recommended several units within a single installation.[124] This, of course, puts

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115. Fire Fighters, U.S. Naval Air Station, Roosevelt Rds., Puerto Rico, GERR 39, C-10 (1964).
116. Int'l Bhd. Electrical Workers, Local 301 (IBEW), Red River Depot, Tex., GERR 39, C-5 (1964).
117. Nat'l Ass'n Govt. Employees (NAGE), Local R-1-3, U.S. Armory, Springfield, Mass., GERR 39, C-5 (1964).
118. Am. Lithographers Ass'n (ALA), Local 98, Naval Oceanographic Office, Washington, D. C., GERR 39, C-7 (1964).
119. Am. Fed. Govt. Employees (AFGE), Lodge 1513, Commissary Store, USNAS, Whidbey Island, Wash., GERR 39, C-9 (1964).
120. Nat'l Ass'n Govt. Insp. (NAGI), Unit 7, USMCAS, Cherry Point, N.C., GERR 39, C-9 (1964).
121. Nat'l Maritime Union (NMU), Far East Area, MSTS, GERR 39, C-11 (1964).
122. Military Sea Transport Union, Honolulu Office MSTS; GERR 39, C-11 (1964).
123. Andrews Air Force Base, GERR 8, (ARB) 63 (1963).
124. U.S.N. Propellant Plant, Indian Head, Md., GERR 23, (ARB) 7 (1964). Four separate units were recommended in a single arbitration decision.

management in the position of having to deal with each exclusively recognized unit on an equal basis. The size of a group does not necessarily prohibit its gaining exclusive recognition if it meets the criteria discussed previously. Units in the Armed Forces that have been granted exclusive recognition range from one[125] to 9,800.[126]

F. A Problem of Administration

It would appear that the unit problem is approaching a satisfactory conclusion. This is not completely so, however. The discretion on the part of agencies in implementing their own instructions and interpreting 10988 is causing administrative difficulty.[127] There is no central body to interpret the Order, nor are there any direct lines of communication to the Secretary of Labor in those cases he is allowed, under Section 11, to appoint

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125. Military Sea Transport Union, Honolulu, MSTS, GERR 39, C-11 (1964).

126. Metal Trades Union, USN Shipyard, Brookland, N.Y., GERR 39, C-8 (1964).

127. Address by Otto Progan, AFL-CIO Educ. Dep't, to Govt. employees, N.Y. City, Nov. 19, 1963, GERR 20, C-1 (1964); address of A. B. Grotta, Pres., AFL-CIO (1963), to Office of Industrial Relations, Dep't of Navy, Washington, D. C. (1963), GERR 4, E1 (1963).

arbitrators.[128] Under the present system, implementing instructions have been drawn by the Civil Service Commission, the Department of Labor, Health, Education and Welfare, Treasury and Defense, as well as each of the secretaries of the various agencies of the Armed Forces and other agencies of the government. Consequently, even though the Department of Labor has done a commendable job in administering Section 11, it is necessary in each case to go through the chain of command of each agency and its subordinates in all of its transactions. One union might have to go through arbitration with several agencies considering the same problem. This is a cumbersome, time-consuming, and expensive procedure, as well as subjecting all decisions to numerous interpretations by various agencies concerned. The various unions have repeatedly complained of this cumbersome process which must be followed in establishing appropriate bargaining units and the

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128. 10988 § 11. This sec. makes it discretionary with each agency head to make determination as to the appropriateness of a unit to be recognized exclusively. There is a right established for either the installation commander or organization to make a request to the agency head for the appointment of an arbitrator by the Secretary of Labor to make an advisory opinion to the agency head as to the qualification of units for exclusive recognition and/or the supervision or judging of the fairness of elections.

majority representation. A desirable solution would be to have a permanent administrative body, whether it be the NLRB or some separately created body, which would be in a position to publish and interpret one set of implementing instructions that would be equally applicable to all. This would also cause uniformity in decision making and avoid duplication of effort for all concerned, both labor and management alike.

Although the unit problems usually arise at the beginning of the labor organization recognition, they are not to be treated lightly. The inclusion or exclusion of an organization from a unit can often have dire results on management or on the labor organization. It will determine the number of units the government will have to deal with and the power a unit will have. Unions will fight to sever their crafts from a large group as when a smaller group is given exclusive recognition its power is increased from what it was when it was only a part of the larger unit. The one-man unit with exclusive recognition is in an equal bargaining position for his rights as the unit with 9,800 members has for its employees. The unit determination is important, so it should be treated as such.

CHAPTER VI

RECOGNITION OF EMPLOYEE ORGANIZATIONS

A. Classes of Recognition

1. General. There are four classes of recognition an employee organization might request: informal,[129] formal,[130] exclusive,[131] and national.[132] Recognition of such employee organizations continues under 10988 as long as the organization satisfies all the criteria for the type of recognition granted. Any type of recognition may be withdrawn upon a determination by appropriate means upon periodic reviews that the recognized criteria are no longer met.[133] One of the deviations from the NLRA is that under the Act there are not different classes of recognition established as there are under 10988.[134] Under the NLRA, labor organizations have only one class of recognition and are equally recognized or not recognized as such. The diversity under 10988 allows a larger

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129. 10988 §§ 3, 4b.
130. 10988 § 5b.
131. 10988 § 6b.
132. 10988 § 5a; DOD 1426.1 (1964)§ VI A(2) 5; NCPI 721, 3-1.
133. 10988 § 4; FPM, ch. 711 (3) 3.3.
134. 10988 §§ 3-5; NLRA § 7.

number of employees to be represented regardless of their union affiliation. To qualify for recognition for any classification under 10988, the organization must meet those basic requirements discussed in the previous chapter in defining an employee organization and as prescribed by regulation.[135]

2. Informal Recognition. Informal recognition will be accorded by an agency to an employee organization to represent its members when such organization does not meet the criteria necessary for formal or exclusive recognition. Such recognition will be accorded regardless of how many other employee organizations will have been granted informal, formal or exclusive recognition. Accordingly such informal recognition may properly be granted to qualified employee organizations which seek to represent members who are employees. To gain such recognition, the organization is required to make formal application for recognition[136] and to show that it represents some at the

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135. 10988 § 2; FPM, ch. 711 (3) 3.3; DOD 1426.1 IV 1 (1964).

136. DOD 1426.1 VI C (1964). Any organization requesting informal recognition must furnish in writing a copy of the organization's constitution, bylaws, and objectives; a roster of officers and representatives; a statement that the organization practices no discrimination based on race, creed, color, or national origin; and proof of compliance with The Code and Standards (see note 40 and 41 supra).

installation. There is no set number of employees from an activity which must belong to the organization before they may be informally recognized.[137] Organizations that are recognized informally may be permitted to present their views to appropriate managerial executives,[138] if such views are matters of concern to its members. This procedure will not be allowed to interfere with the efficient conduct of the activity's business, however. This does not mean that management must consult informally recognized organizations in its formulation of personnel matters. In effect, informal recognition is no more than a long-established practice of receiving and considering employees' and unions' views.[139] There is nothing, however, to prohibit management from inviting representatives of organizations with informal recognition to participate in joint employee counsel groups and it would appear to be

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137. FPM, ch. 711 (4) 1.

138. DOD 1426.1 IV 3 (Aug. 18, 1964) defines "management executive" as a person who makes or responsibly recommends management policies, or directs or manages a program, activity or major function of the Dep't of Defense, including any individual who exercises any executive authority over any administrative entity or portion thereof whose employees comprise a unit established for formal or exclusive recognition purposes, and his immediate subordinates having significant supervisory responsibilities.

139. FPM, ch. 711 (11) 4 (4.2).

a reasonable solution to giving informal groups an opportunity to air their thoughts, as well as give management the opportunity to disseminate such information as they deem appropriate to such groups.

3. Formal Recognition. Whereas informal recognition has no particular criteria for recognition other than those general requirements that all employee organizations must meet, those requesting formal and exclusive recognition have specific criteria. Where formal recognition is requested, the organization must affirmatively establish that 10% of the unit are members of the organization, and that no other organization has qualified as exclusive representative for the unit,[140] as well as the requirements of informal recognition having been met,[141] before formal recognition will be granted. Once another organization is granted exclusive recognition, formally recognized units lose their recognition. This is contrary to the practice with informally recognized units, as discussed above. Management has the prerogative not to grant formal recognition to employee organizations who, because of their particular peculiarities, often drop in

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140. 10988 § 5.
141. See note 135, supra.

membership below 10% of the unit.[142] An example of such a unit might be a group that extends beyond 10% due to seasonal requirements. If the agency is satisfied that the membership of the organization equals or exceeds 10%, it may grant formal recognition without requiring any affirmative proof. The scope of 10988 is broad and authorizes each agency to establish procedural rules to carry out its own doctrine.[143] The Federal Personnel Manual sets forth such procedures for all governmental agencies.[144] Each agency in turn publishes their own, such as the Navy Civilian Personnel Instructions (NCPI) or the Army Civilian Personnel Regulations (CPR). Where there is some question concerning the vote, it is allowable for an agency or labor organization to have an independent outside source count the vote or authenticate records to determine membership.[145]

For the purpose of formal recognition, the unit will not normally have to be as precisely defined, as those units only formally recognized represent only those persons who belong to their organization, whereas a unit that is given exclusive recognition represents all the

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142. 10988 § 4; FPM, ch. 711 (5) 1a.
143. 10988 § 10.
144. FPM, ch. 711.
145. 10988 § 11; FPM, ch. 711 (5) 1(2).

persons in the unit regardless of whether they are members of the employee organization or not. There will be occasions when organizations will have a close vote and the agency or organization requesting formal recognition will require a definitive determination of the composition of the unit before the percentages can be determined. Once an employee organization is granted formal recognition, the agency must consult with it from time to time on the formulation and implementation of personnel matters which might affect the members of its unit.

The consultation right has significant meaning as, if it is interpreted literally, it is difficult to separate those orders and directives that do have some reference to personnel matters from those that do not. It might appear that the unions would not be allowed to discuss personnel matters if they were of that category that are within the prerogative of management. "Prerogative of management" is a nebulous term, however, and it would seem better to discuss anything pertaining to personnel. Even so, there is no requirement that management follow, but only that they listen. To union leadership, it is important to be able to present their problem to someone of prominence on the management team so as to enable them to report to their membership that their problem has been aired.

Not only must the agency consult with the organization, but it must manifest an affirmative willingness to seek a satisfactory understanding. The employee organization is further entitled to present its views at any reasonable time pertaining to personnel policies, practices, working conditions, and other related matters of employment.[146]

4. Exclusive Recognition. The very heart of 10988 is the granting of exclusive recognition to employee organizations.[147] Those units that are granted exclusive recognition are in a position to collectively bargain with the installation management concerned for their unit, as well as negotiate a contract. This means that even though many personnel in the unit might not belong to the organization or have acquiesced in its philosophy of representing them, they will nonetheless be represented by the organization once it has, in fact, received exclusive recognition. When collective bargaining takes place on personnel matters or a contract is signed by the employee organization and the agency, all the members of the unit are bound even though they might not agree with anything the employee organization stands for or has

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146. 10988 § 4b; FPM, ch. 711 (5) 5-2; DOD 1426.1, XI B (1).
147. 10988 § 6.

contracted with the agency for. As a result of this, the agencies in implementing 10988 provisions have attempted to be particularly careful that the procedures set forth in pertinent regulations be explicitly followed before an employee organization will be granted exclusive recognition.

It is normal practice for those requesting exclusive recognition to have been recognized formally prior to the time that they are recognized exclusively, inasmuch as the requirements for formal recognition must be met before exclusive recognition may be granted. Employee organizations will be granted exclusive recognition and be allowed to represent the employees in the unit when such organization has met the criteria for formal recognition and has been selected by a majority of the employees of such unit. The greatest difficulty in determining whether exclusive recognition will be granted is determining the unit, as discussed in Chapter V, and the election procedure discussed subsequently in this chapter.

In considering granting exclusive recognition, it must be remembered that in determining the number of persons in the unit who can be counted toward the 10% necessary for formal recognition, or the 30% necessary for an election, to determine exclusive recognition certain persons of the unit cannot be considered. They are:

managerial executives, any employee engaged in federal personnel work in other than a purely clerical capacity; supervisors who affirmatively evaluate the performance of employees and the employees whom they supervise; and professional employees,[148] unless the majority of professional employees vote to be included in the unit.[149] The fact that these persons are prohibited from being counted toward the total in the unit before recognition does not mean they cannot be members before or after recognition. They will not be allowed to hold office, however, unless the unit is one of a managerial or supervisory nature.[150] It would appear that the reason for these restrictions is to keep management away from union functions.

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148. A professional employee is an employee whose duties are to perform advisory, administrative, or research work which is based on an understanding and application of, as opposed to mere application of, the established principles of a science or other field of knowledge which is generally recognized as conferring professional standing on a person engaging in such work, which requires knowledge in a field of science or learning customarily acquired through study at a college or hospital, as distinguished from a general education; or as established as a position under the Classification Act of 1949, as amended, is properly placed in one of the series of that Act appropriate for such position at a level of GS-5 or higher. DOD 1426.1, IV, 4 (1964).

149. 10988 § 6.

150. DOD 1426.1, VI, H-1 (1964).

5. National Recognition. Formal recognition at the national level is authorized by Section 5 of 10988 when, in the opinion of the agency head, an employee organization has sufficient total membership within the agency as a whole, or a sufficient number of local organizations within the agency to justify it. The Department of Defense has authorized its agencies to so recognize unions.[151] The agencies have, in turn, adopted such a policy.[152] This practice obviously is advantagous to the unions, as it gives them a chance to deal at the agency level on policy matters and perhaps influence policy before it is promulgated to the installations. Without such recognition, coupled with the prohibition of bargaining on matters already decided by present and future regulations,[153] the union has difficulty progressing beyond the activity level. As of 1 March 1965, no unions have been formally recognized on the national level. The mere fact that this provision is made, however, is indicative that the unions will eventually have a great deal more to say about policy. It is to be emphasized that such recognition is not, in this writer's opinion, intended to

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151. Id. at VI, A(5).
152. See NCPI, 5a, for an example.
153. 10988 § 7(1).

take the place of or in any way to detract from bargaining on the activity level. If this were done, it would defeat the real meaning and purpose of the program of creating and maintaining personal employee-management cooperation and understanding.

Finally, the various types of recognition are in no way intended to modify or preclude the renewal or continuation of any lawful agreement previously entered into between an agency and an employee organization. The Order does not preclude any agency from continuing to consult or deal with any representative of its employees or other organization prior to the time that the status and representation rights of such representative or organization are determined in conformity with the Order. In the absence of any effort on the part of an employee organization to establish relations contemplated by the Order, the agency and the organization should consult to the extent that the organization would if formally recognized.[154]

B. Voting for Exclusive Recognition

Perhaps the two most controversial issues connected with granting exclusive recognition are the determination of the unit and the rules concerning the vote necessary

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154. FPM, ch. 711, 1(1) 4c; NCPI 721 (1) 2c; 10988 § 15.

to establish the unit. Considering arguendo that the unit has been established, the question arises as to what percentage of the people in the unit must agree to have the organization represent them before the unit will be granted exclusive recognition, and what procedure must be followed to make the determination. Executive Order 10988 states formal recognition will be granted when "designated or selected by a majority of the employees of such unit."[155] The NLRA also prescribes that a majority vote of the employees in an appropriate unit will determine whether the unit will be recognized.[156] It has been the practice under NLRB that if a majority of the persons who vote in an election vote for formal recognition that will suffice.[157] This is appealable if the election is claimed to be non-representative. This would technically mean under NLRA a unit with 1,000 people, 500 of whom belonged to the union, and only 100 voting, would require only 51 votes for exclusive recognition. Nonetheless, all 1,000 members of the unit would be bound by the contract made.

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155. 10988 § 6.
156. NLRA S 9(a); 29 U.S.C. § 159a (1958).
157. NLRB v. Whittier Mills Co.,111 F.2d 978 (7th Cir. (1940); N.Y. Handkerchief Co. v. NLRB, 114 F2d. 144 (1940).

In contrast with the NLRA procedure, the Department of Defense has created the so-called "60 percent rule." This rule states that before a union can be formally recognized at least 60 percent of all the employees eligible to vote who are members of the unit must vote, and a majority of those voting must vote for recognition, or, in the alternative, a majority of all members of the unit must vote "Yes."[158] This creates a situation where if 60 percent of all the employees eligible to vote do, in fact, vote, only 51 percent of those voting, or 31% of the total unit, would have to vote for recognition for the union to win. If 59 percent voted, a majority of all the people in the unit, 51 percent of the total unit membership, would have to vote for formal recognition. For example, if there were 200 people eligible to vote in a unit, and 120 (60 percent) voted, only 61 would have to vote for recognition; but if 119 voted, a majority of 101 people would have to vote for recognition. A similar case arose at the U. S. Naval Station, Cecil Field,

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158. FPM 711 (6) 4; DOD 1426.1, VI B (1964); NCPI 721-3D.

Florida.[159] The unions have been most critical of this procedure inasmuch as they believe the same procedure should be followed as is followed under the NLRA.[160] Mr. B. A. Gretta, President of the AFL-CIO, Metal Trades Department, in September of 1963, stated:

> "Labor is vigorously opposed to the requirement that in elections it must get a majority of all those eligible to vote when less than 60% of the eligible participate. Some equitable solution must be found to the warped application of the majority vote rule as is being applied by the various agencies in elections conducted under the order. It is manifestly unfair."[161]

On November 11 and 12, 1963, at the 51st convention of the AFL-CIO Metal Trades Department Convention in New

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159. Administrative Ruling of the Secretary of Labor Pursuant to 10988 § 11, ADM. Rule No. 1 (March 8, 1963). The Int'l Ass'n of Machinists [hereinafter cited as IAM], Lodge 1630, Cecil Field, Fla., was having an election. They received a plurality of all votes cast, but were three votes short of a majority. There was another union running. Ninety-three percent of those voting and 80% of those eligible to vote, voted for union representation. The Secretary of Labor denied an appeal under § 11, 10988, pointing out that formal recognition was available under the order. Cf. speech of Mr. B. A. Gretta, Pres. AFL-CIO, to Industrial Relations Office, Dep't of Navy (Sept. 26, 1963), GERR 4, E-5 (1963).

160. A study of the NLRA and NLRB decisions have disclosed no fixed requirement as to the number of eligibles who must participate in an election in order to have the majority vote of the participants be determinative.

161. GERR 4, E-5 (1963).

York City, the problem of elections was discussed in some detail. In connection with the 60 percent rule, it was commented that 10988 is couched in language very similar to the NLRA when it prescribes that an organization will act as the exclusive representative of the employees in an appropriate unit when such organization "has been designated or selected by the majority of the employees in such unit."[162] The representatives at the convention expressed their shock to find that under the order its departments and councils acquiesced in the so-called "60 percent rule." DOD 1426.1 (1962)[163] was vigorously criticized as was NCPI 721. It was considered unduly restrictive and discriminative, in favor of employers, to apply the 60 percent rule.[164] These comments by the AFL-CIO leadership indicate that the unions are quite disturbed about the 60 percent rule, and it is reasonable to assume that they will attempt to take appropriate action to have this problem alleviated by executive edict or legislation. It would appear that the unions are having difficulty in getting the 60 percent rule rescinded

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162. LMRA § 6.
163. DOD 1426.1 (1962) superseded by 1426.1 (1964).
164. Rep. of Metal Trades Dep't, AFL-CIO, on 10988 at 51st Convention, N.Y. City (Nov. 11-12, 1963), GERR 10, (C 2-3) (1963).

inasmuch as DOD 1426.1 of 18 August 1964 did not change it. An attempt was apparently made by the Civil Service Commission to whittle away at the 60 percent rule.[165] Inquiry was made as to whether 60 percent of all persons in the unit must vote or only 60 percent of those persons in the unit present on the day of the vote should have to vote. The Civil Service Commission emphasizes the suggestion of the President's Temporary Committee on Implementing 10988 that generally a "representative vote" in representative elections would mean a minimum of 60% of those employees in the unit who are eligible to vote. However, it was contended that the 60 percent rule "was not meant to be applied as a rigid rule," but only as a guideline. The Commission suggests a "representative vote should generally mean a minimum of 60% of those in the unit who are present at the time of the election and eligible to vote." Subsequent to the above interpretation, no arbitration decision has been handed down where a union has not had 60 percent of the vote, but has been close to that figure, and the agency refused to grant recognition. Once again, however, DOD 1426.1 (1964), which was subsequent to the above letter, did not include

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165. U.S. Civil Serv. Comm'n Bull. No. 711-6 (1964).

the interpretation given the 60 percent rule by the Commission. This, of course, points up the unions' complaint of non-uniformity among the agencies. I am of the opinion that if the facts of the Cecil Field Case[166] were to go to an arbitrator now, it would be decided that recognition had been gained.

Mr. Macy, the Chairman of the Civil Service Commission, in a report to the President on the second anniversary of 10988, sympathized with the unions' problem with the 60 percent rule, but believed the present voting procedure should continue inasmuch as complaints were made in only a small number of cases. He believed, however, that the rule should be scrutinized in the future to determine whether any adjustment should be made.[167] It is to be remembered that Mr. Macy was the Vice Chairman of the Task Force which recommended 10988. After Mr. Macy made his report to the President, John Griner, President of the American Federation of Government Employees, agreed with it in general, but emphatically disagreed with the 60 percent rule and stated that "the requirement that 60 percent of the employees in a unit must vote to make a bargaining election valid should stop. A union which gets a majority of votes cast should receive exclusive recognition."[168]

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166. See note 155, supra, for facts of Cecil Field case.
167. GERR 21, (A01) (1964).
168. GERR 25, (A-2) (1964).

It can be seen why labor organizations dislike the 60 percent rule even though there are large numbers of government personnel who are now members of employee organizations which have acquired exclusive recognition.[169] If a union only had to have a majority of the votes cast, this would allow a smaller percentage of the employees to acquire exclusive recognition, resulting in binding all the members of the unit, regardless of their interest.

There might be some question as to the intent of the drafters of 10988, as they did not include the 60 percent rule only requiring a majority of the unit,[170] but it is obvious that the drafters of the administrative instructions submitted by the agencies, such as Department of Defense Directive 1426.1 (1964), felt a very strong duty to protect the individual employees from having to participate in union activity or from being controlled by union contracts with the agency unless an actual majority of the employees wanted to participate. The drafters, it might be surmised, intended an interpretation that was the same as that followed by the NLRA when their background is considered and when the similarity of language

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169. GERR 39, (C-1) (1964). Employee organizations have gained exclusive recognition as of June 8, 1964, for 244,000 civilian employees of the federal government excluding the Post Office Dep't, which represents 490,000.

170. 10988 § 6a.

of 10988 is compared with NLRA, Section 9(a). Because of the political influence of labor unions and their important part in our society today, it appears to the writer almost certain that the interpretation as to voting decided under the NLRA will be followed in the not too distant future. The unions already have some support for their position, as Labor Secretary Wirtz is sympathetic to the union position on the 60 percent rule. In November of 1963, Secretary Wirtz told the unions to be patient with 10988 and promised his "complete support" to have the 60 percent rule changed. He stated, further, that at the present time all that could be done was to try to "sell" the various government agencies on revising their present policies by administrative instructions.[171]

The unions argue that under the democratic process in the United States, the actual number who go to the polls and vote, though important, should not be controlling, as the same situation is prevalent in political elections and they are not invalidated or refused to be conducted based on the number of people who vote. Some union representatives believe that education of the members of the unit on their responsibility to vote and

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171. GERR 10, (A-6,7) (1963).

represent their rights is the only solution, and once the members of the unit are educated to their obligation to vote and do not, they should have no recourse against those who do vote and end up controlling the unit.[172] It is contended that all NLRB-type elections are not necessarily accepted as representative. An example is cited where there were 55 members in a unit and only 24 votes were cast. It was decided that the 24 votes were not a representative vote.[173] The above case is used as an example that the private system makes equitable decisions and consequently the same could be true under 10988.

It would appear to this writer that perhaps there is no authority on the part of the agencies to modify Section 6(a). Section 6(a) requires no 60 percent rule, but only the majority by the members of the unit. The NLRB has uniformly held that a majority means a majority of those voting. Section 6(a) appears clear and unambiguous and should not be subject to administrative construction, as there is no power granted by 10988 to amend it by regulation.[174] This is presupposed on the fact that

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172. Comments heard by this writer from various labor leaders at a seminar on labor relations, Washington, D. C. (Feb. 1964).
173. Alaskan Glacier Seafood Co., 25 LRRM 1346 (1950).
174. Kashland v. Helvering, 298 U.S. 441 (1936).

executive orders have the force of law to the same extent as a legislative enactment.[175] Where an act is plain and unambiguous, the government agency administering the statute has no power to amend or extend it by regulation.[176] The agency should be bound by 10988 as its own regulation.[177] It of course could be changed by an amendment to the executive order. Until that time, it would seem that even the President would be bound by his own order.

C. Exclusive Recognition Without Election

There will be many instances where units will acquire exclusive recognition without the requirement of an election. Executive Order 10988 prescribes granting exclusive recognition where the organization has been "designated or selected by a majority of the employees of such unit as the representative of such employees in such unit."[178] This language has been elaborated on and implemented in detail by Department of Defense Directive,[179]

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175. U.S. v. Gilbertson, 111 F2d. 978 (7th Cir. 1940).
176. U.S. v. Powell, 95 F2d. 752 (4th Cir. 1938).
177. See Service v. Dulles, 354 U.S. 363 (1957); Acardi v. Shaughnessy, 347 U.S. 260 (1954).
178. 10988 § 6a.
179. DOD 1426.1, VI, B (1964).

and further by the particular agencies in question, such as the Secretary of the Navy.[180] An example of the latitude with which an agency may direct its activities to determine majority status in a unit is the Secretary of the Navy's NCPI, which directs, in connection with exclusive recognition, that an election does not have to be held to determine whether a majority of unit desires representation by the unions if satisfactory evidence exists that a majority of the eligible employees in an appropriate unit want to belong to the organization or have indicated in writing that they desire to be represented by the organization.[181] This determination of majority status does not mean that a majority of the members of the unit must belong to the employee organization, as under the provisions of Section 5A of 10988, only the requirements for formal recognition have to be met and only ten percent of the employees of the unit must be members of the organization to gain such recognition. The remainder of the fifty-one percent required for the majority of any particular unit can be acquired by getting members of the unit, who do not necessarily desire to be members of the employee organization, to sign "authorization cards," (proxy

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180. NCPI, 721 § 3.
181. Id. at 3-2 (c)2.

cards) stating that they agree to be represented by the organization.[182]

The determination as to whether an election is to be held or whether the unit will be accepted without an election for the purposes of exclusive recognition remains within the discretion of the agency. In the event an organization claims a majority representation for the unit and the agency won't accept the evidence establishing the alleged majority, the organization may ask for an election if it can show it has 30% of the employees of the unit as members.[183] If the agency refuses to allow the election, the union can request that an arbitrator be appointed to make an advisory opinion as to its right to hold an election, as well as to supervise it if they are entitled to it.

Recognition is, of course, the beginning of the management-labor relationship. Care must be exercised to ensure the employee and employer have their respective positions protected. Once the recognition problem is resolved, the union representing the unit has a good deal of control over the daily activity and working conditions of all in the unit. This becomes even more pronounced when the contract is successfully bargained for.

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182. Id. at C(2)a.
183. Id. at 3 C(3).

CHAPTER VII

NEGOTIATED AGREEMENTS

A. Scope of Inquiry

The scope of inquiry here is the content of the agreement between labor and management and not the mechanics of negotiation. Suffice it to say that negotiations are carried on by labor and management teams whose size depends on such things as the complexity of the unit and scope of the matters to be bargained for. Often the contracts will be long[184] and the time consumed in reaching agreement on them lengthy.[185]

The negotiated agreement is one of the primary advantages the exclusively recognized union is entitled to and desires. The agreement is no more or less than a contract and should be treated as such. At the outset it must be realized that the government has not given up all its rights and control over labor and has specifically reserved some prerogatives that labor in the civilian sphere can negotiate. The law directs management and labor to remain within the provisions of

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184. U.S. Army Missile Support Command, Redstone Arsenal, and AFGE Lodge 1858, 37 GERR (contracts) 160 (1964). This contract consists of 28 arts., with 37 secs.

185. Puget Sound Naval Shipyard and Bremington Metal Trades Council, 00 GERR (contracts) 2 (1963). This negotiation took eight months.

pertinent governmental[186] and agency[187] regulations when reaching an agreement.[188] Management is further prohibited from contracting away its managerial rights which include such things as: the right to direct, hire, promote, transfer, assign, retain within a job, suspend, demote, discharge, relieve for lack of work, and determining the method, means and personnel by which the job is to be done.[189] All contracts must include such restrictive clauses.[190] It is obvious that the government does not intend to approach negotiation with employee organizations on the same basis as private employers.

Even with these restrictions, in our large and complex governmental structure there is substantial room for give and take in matters that do not go to the heart of governmental authority. Certainly there must be significant differences in attitude between the roles of the executive branch in carrying out public policy and its role as an employer. An analysis of a good number

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186. 10988; FPM; Code; Standards.
187. Dep't of Navy Inst. will be cited as examples of typical agency instructions. Care should be taken in services other than the naval service to check appropriate regulations.
188. 10988 § 7(1).
189. 10988 § 7(2).
190. Army Eng'r Dist., Buffalo, N.Y., and Nat'l Maritime Union of America, AFL-CIO, art. II § 3, 21 GERR (contracts) 38 (1964).

of the contracts negotiated makes it obvious there are numerous problems left to negotiate and ample problems to cause both the government and labor difficulties if mistakes are made. The importance of intelligent negotiation procedures cannot be overemphasized. Even though there is a two year maximum limit on the contract period,[191] precedents established are hard to overcome in future negotiations. The reality that once the contract is signed the terms are to be complied with must be realized or the consequences can be expensive. For example, "wash up time" is a negotiable matter. Human nature being what it is, people will wash where they have never washed before because they think they are getting something for nothing. In the Puget Sound Shipyard Contract,[192] the following clause will be found: "A reasonable time for clean up prior to lunch and prior to the end of the shift will be allowed each employee where duties have been determined by the employer as requiring personal hygiene for the control of health hazards." There are 9,686 employees in that unit,[193] and if they are allowed five minutes before lunch and at the end of

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191. DOD 1426.1 X C 2d (1964).
192. Puget Sound Naval Shipyard and Bremington Metal Trades Union, art. 7 § 4, GERR 00 (contracts) 2 (1963).
193. GERR 39 (C-8) (1964).

the shift, five days a week, at an average salary of $2.50 per hour, the cost will be $104,884 per annum. This is not intended as a criticism of the Puget Sound contract, but it does emphasize what a little time can cost and what a possible error might encompass.

B. Classification of Contracts and Clauses

Contracts have been classified in three general categories. First, the so-called "boiler plate" consists of those mandatory provisions directed by 10988, the agency requirements, and perhaps provision for union-management meetings. This type of contract is normally found where the union is being initially recognized and local union management is satisfied to get anything to become established. [The Marine Corps Air Facility, New River, North Carolina, and Naval Auxiliary Air Station, Chase Field, Texas, contracts are examples.[194]]

A second category is the so-called "boiler plate plus." This is a contract that makes provision not only for mandatory requirements but may go somewhat further and include agreements on such things as shop

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194. Marine Corps Air Facility, New River, N.C., and AFGE; Naval Auxiliary Air Station, Chase Field, Tex., and AFGE, on file in Office of Industrial Relations, Dep't of Navy.

stewards, use of government facilities, promotion programs, and provision for the function of union officers. At times many current agency regulations will be included. This might appear peculiar inasmuch as the provisions of the agreement must adhere to existing regulations, but it is often desirable to re-emphasize an already regulated issue. The Military Sea Transport Service has entered into a good number of this category of contract.[195]

The last general category of contract is known as a "full contract." Such a contract will have numerous types of agreements, being limited only by law or regulation. The subject matter that has been included in contracts to date can be classified as that pertaining to union affairs, duty status of employees, and employee relations and leave.

Normally the union is particularly interested in reaching a clear understanding as to the rights the union has to carry on union affairs within an installation. Provision has been made for the appointment and

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195. Military Sea Transport, Atl. Area, and Nat'l Maritime Union of America, AFL-CIO, GERR 6, (contracts) 62 (1963).

duties of shop stewards. Such clauses designate "a reasonable number"[196] or set out a definite ratio based on the number of employees.[197] A definite number appears a more reasonable approach to avoid ambiguity. Most contracts to date have used the ratio approach, with the ratio varying considerably.[198] The importance of the number of stewards is that they are allowed to perform many of their functions during the work day.[199] The use of government facilities such as bulletin boards, space in the house news organ, meeting areas, and the conduct of union business on the government installation during non-work hours, are items that have been bargained for.[200] Agreement is often made to allow appointed or

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196. Blue Grass Army Depot 1 and Ft. Estill Lodge 859 IAM, AFL-CIO, art. XII-1, CERR 42 (contracts) 197 (1964).

197. Charleston Naval Shipyard and Charleston Metal Trades Council, AFL-CIO, art. IV-2, GERR 36 (contracts) 149 (1964).

198. Ibid. (Ratio one steward per quarterman.). Nat'l Naval Medical Center, Lodge 361 AFGE, AFL-CIO, art. VI-1, 4 GERR 9 (contracts) 82 (1963) (ratio one steward per forty employees).

199. U.S. Naval Supply Center, Norfolk, Va., and Lodge 97, IAM, art. XXI-1, GERR 23 (contracts) 45 (1964).

200. Fed. Aviation Agency, Atlanta Aircraft Maintenance Base, and Lodge 2123, AFGE, art. XXI, GERR 33 (contracts) 45 (1964).

elected union officers leave of absence on an earned annual leave basis or a leave without pay basis to act in such offices.[201] This applied to union office above the local level. From an examination of such concessions concerning union affairs, it can be seen that much time will be lost and money expended in the execution of union affairs. The question is will the worker be happier or the quality of work improve.

Employee duty status is a bread and butter item to the union, as these are the provisions that deal most directly with the employee from day to day. Usually the hours of work are set out in the agreement and provision made for no change to be made unless the union is consulted.[202] There is nothing to prevent the negotiation of which hours will be worked so long as the eight hour day is not infringed upon. Overtime procedures may be established entailing the criteria to be used in determining who will be the recipient.[203] Some agreements have required the employee to be notified a set number

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201. U.S. Naval Station, Washington, D. C., and Washington Area Metal Trades Council, art. XIV-1, GERR 45 (contracts) 239 (1964).

202. Charleston Naval Shipyard and Charleston Metal Trades Council, AFL-CIO, art. VI, GERR 36 (contracts) (1964).

203. Id. art. V.

of hours before he has to perform the overtime,[204] and others go so far as to allow him to refuse it.[205] A controversial issue often discussed has been the question of coffee breaks and lunch periods. There is no reason a coffee break or lunch period cannot be agreed upon, but the controversy is can they be allowed during the paid eight hour day? In the Redstone Arsenal Contract,[206] it was agreed that a thirty minute "lunch break" and two fifteen minute "rest periods" during the paid work day would be allowed. An examination of the papers accompanying the New York Naval Shipyard[207] or the Puget Sound Shipyard[208] contracts will show that the respective unions tried to reach agreement on "coffee breaks" during paid working hours but were refused. The basis of the Navy refusal was its regulation establishing a forty-hour work week[209] for civilians. They reasoned two fifteen-minute coffee breaks a day would amount to their employees working only thirty-seven and one-half hours a week, but they would be paid for forty hours.

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204. Ibid.
205. Ibid.
206. U.S. Army Missile Command, Redstone Arsenal, Ala., and Lodge 1858, AFGE, art. XII §§ 1, 5, 6, GERR 37 (contracts) (1964).
207. New York Naval Shipyard and Brookland Metal Trades Counsel, AFL-CIO, GERR 12 (contracts) (1963).
208. Contract cited note 180, supra.
209. NCPI, 610.1 (4)d.

It appears to this writer that the Navy's position is correct. The Comptroller General said in a case concerning G.P.O. employees: "In fixing compensation for journeymen, apprentices, laborers, etc., . . . by the hour for the time actually employed under the procedure set out in the Act of June 7, 1942, neither the daily lunch of one-half hour nor any other period of non-employment during which the employees are regularly and totally excused from duty may be included in official time worked and be counted as time to be paid for."[210] Even though this decision had direct application to G.P.O., it appears the inference is clear and the principle expressed would be applicable to coffee breaks, rest periods, or lunch breaks. Nonetheless, it is a negotiable matter, depending on one's outlook. This particular problem has to be distinguished from the "clean up time" situation, as that is based on "hygiene," and is often allowed.[211]

A third type of clause deals with employee relations and leave. Of most importance are the questions of grievance procedures and advisory arbitration. Regardless of any contract provision, each agency is

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210. Comp. Gen. Dec., B-51791 (1945) 25 CG 315.
211. Contract cited note 180, supra.

authorized to have and does have a grievance procedure. An example is the Navy's, which allows a man to discuss his grievances with his supervisor, department head, and appeal to the installation head. There is provision for a full hearing, with final appeal to the Civil Service Commission and/or the Secretary of the Navy.[212] As can be seen, the appeal never leaves government channels. Grievance procedure is a negotiable matter and if such a provision is negotiated, the employee has a choice of which procedure he desires to follow, but once the selection is made he cannot change to the other.[213] Generally, the negotiated grievance procedure provides for about the same procedure as the agency regulation except the employee's shop steward will represent or be with him at each step, and provision will be made for an arbitrator appointed by the Federal Mediation and Conciliation Service, the expense to be borne equally by the agency and the employee organization.[214] Prior to any grievance

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212. NCPI §§ 750, 770.

213. DOD 1426.1, XI, 4 (1964).

214. U.S. Naval Air Station, Jacksonville, Fla., and IAM, AFL-CIO, art. XXVII, GERR 29 (contracts) (1964); Blue Grass Army Depot, Richmond, Ky., and IAM, AFL-CIO, art. XIII, GERR 42 (contracts) (1964); U.S. Coast Guard Aircraft Repair and Supply Base, Elizabeth City, N.C., and IAM, AFL-CIO, art. XIX, GERR 35 (contracts) (1964).

procedure being used it must be determined if a grievance exists. Some questions are not subject to grievance, such as reduction in force, letters of caution, race discrimination, and incentive award decisions as a result of other appeal provisions. To avoid any confusion on what is subject to grievance, many contracts have set out in the contract what will not be subject to grievance procedures.[215] If this is not done, the final decision as to the existence of a grievance rests with the agency.[216]

Other clauses found under this category are clauses pertaining to discipline of members of the unit. Provision is made for management to inform the union of all intended disciplinary action against any member of the unit, member of the union or not.[217] Procedures for granting annual leave are established giving preference to those with the most seniority,[218] and membership on certain committees, such as safety committees, is authorized.[219]

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215. N.Y. Naval Shipyard, N.Y., N.Y., and Brooklyn MTA art. XX 4, GERR 12 (contracts) (1963).
216. Code § 3.4.
217. U.S. Naval Station, Washington, D. C., and Washington M.T.C., art. XVIII, GERR 45 (contracts) (1964).
218. U.S. Naval Supply Center, Norfolk, Va., and IAM, art. VIII, GERR 23 (contracts) (1964).
219. Id. at art. XII.

In negotiating for any of the above clauses, where union members are granted the right to carry on union business such as acting as shop stewards, representation at grievance hearings, committee meetings, etc., it should always be kept in mind that it will cost management money, as most of this type of thing is done during paid work periods.

"Work Assignment" provisions are a fourth type of clause. Agreement has been reached for supervisors not to have to do non-supervisory work;[220] consideration by management of union recommendations as to appropriate trade or craft jurisdiction on job ratings;[221] representation of employees at job rating hearings;[222] the appointment of union members to wage survey boards and to participation in wage data collection;[223] union representation on incentive award boards;[224] consultation with the union before a reduction in force and subsequently allowing preference to those previously reduced when promotions are made;[225] and notification to the union before farming out work.[236]

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220. Id. at art. XVI.
221. Id. at art. XIV.
222. Ibid.
223. U.S. Naval Air Station, Jacksonville, Fla., and IAM, art. XI, GERR 29 (contracts) (1964).
224. U.S. Coast Guard Aircraft and Supply Center, Elizabeth City, N.C., and IAM, art. XII, GERR 35 (contracts) (1964).
225. Case cited note 217, supra, art. XV.
226. U.S. Naval Supply Center, Norfolk, Va., and IAM, art. XVII, GERR 23 (contracts) (1964).

The clauses mentioned are not intended to be inclusive, but demonstrate somewhat the variety of situations that have been included in contracts to date. None of those agreements already approved are considered an infringement on managerial rights,[227] though such determination is often difficult to make. It certainly can be anticipated that many impasses will be encountered as a result of questions of what is and is not a prerogative of management. An example is "farming out" work. For years, it was assumed that farming out was a managerial function and thus not a subject of arbitration even though many contracts did, in fact, have provision for farming out. The Supreme Court in 1964 decided this was not a managerial prerogative,[228] but, to the contrary, a mandatory subject for collective bargaining under NLRA § 8(d).

C. Weakness of Negotiation

There are certain weaknesses which make the negotiation of a contract most difficult and as a result create an atmosphere inconsistent with the intent of the Order

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227. 10988 § 7.
228. Fiberboard Paper Products Corp., NLRB No. 14 (Oct. term 1964).

to establish better employee-management relations. These impediments are readily seen when the Standards of Conduct[229] are examined. Section 3.2A(1) of the Standards prohibits union shop strike,[230] work stoppage, slowdown, and related picketing, the right of arbitration if an impasse is reached over matters to be negotiated, and reserves the right of the agency to take whatever action is necessary in emergencies.

In view of the nature of government operations, and the fact that the government should not be put in the position of a civilian employer because of its sovereignty, I take no issue with many distinctions between 10988 and LMRA. Certainly the unions' normal economic weapon of strike could not be tolerated. Strikes would disrupt the operation of government and put a non-sovereign entity, labor, in the position of dictating to government. Some might argue that there would be little difference between a strike in a civilian plant making rockets and a strike of employees working for the government, as both would hurt the overall government effort. Surely not making rockets would hurt the government, but it does not go to the heart of the operation

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229. See note 40 supra.

230. Fed. employees are also prohibited from striking by statute. 5 U.S.C. § 118(p) (1955) Violation is a felony. 5 U.S.C. § 118(r) (1955).

of the government apparatus as would a strike of actual government employees, which would paralize all government functions, not just production of supplies. The same position would hold true to work stoppage, slowdown, and picketing. The failure to allow arbitration or provide some remedy for an impasse as to what is negotiable, and demanding that no agreement be made that is in conflict with the FPM or other agency regulation is another matter. Both of these restrictions go to the very heart of any bargaining and for all practical purposes stop a good percentage of it. If Section 7 of 10988 is literally construed and management never detaches itself from their regulations, to which some become devoted, there is little use of having 10988. Regulations should not be considered as holy writ. This is not intended to propose that regulations should be disobeyed, but they may be changed, modified, interpreted, and negotiated. Emphasis on regulatory supremacy can stifle collective bargaining, and force unions to continue to use the political approach to their problems. By political approach is meant the union leadership complaining to Congress, who, in turn, applies political pressure on the departments and agencies. Congress would be more prone to refuse to interfere if there were some dynamic regulatory procedure used.

Aside from the regulation problem, a more critical area is the lack of provision for arbitration when a deadlock is reached over whether a particular matter is subject to collective bargaining. Section 8, 10988, permits the appointment of an arbitrator, with the consent of the parties, to consider and interpret already negotiated matters, but then only to the extent of making an advisory decision to the agency head. Section 11 provides for the appointment of an arbitrator, at the request of one or both of the parties, to make an advisory opinion to the agency head on unit or election controversies. Lastly, there is no prohibition against agreeing to the appointment of an arbitrator to settle grievances that cannot be settled. Other than these situations, the agency is law maker, judge, and jury. Not only is there no provision for arbitration of deadlocks on what is negotiable, there is no authority to agree to any type of arbitration with the exception of grievances. To eliminate any possibility of a misunderstanding on this matter, at least one agency has by directive prohibited the inclusion of arbitration in the contract except in the grievance situation.[231] What the inability to demand

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231. Office of Industrial Relations Notice (Navy) 12000 (1963) amending NCPl 720.2-9 (hereinafter cited as OIR).

arbitration as to what is negotiable means is that the agency can refuse to discuss any problem they desire and there is no appeal therefrom. The Order, by failing to provide for the handling of such problems to an effective conclusion, allows the government through its agencies to at will negate the equality of bargaining which it allegedly provides.

The argument that the installation must perform fairly as their agency reviews all contracts before approval [232] is a shallow one. There has been little activity on the agency level other than to approve the determination of the installation head, which was the case in the shipyard cases. The Navy has, on occasion, however, directed that proposed contract clauses be amended or deleted to limit union members nominated to disciplinary, grievance, and performance rating committees to members of their unit and to the exclusion of supervisory personnel. They have also directed the prohibition of negotiation of any promotion proviso dealing with supervisors above the first level; disallowance of paid lunch periods; and the prohibition of a proviso requiring that advisory arbitration be invoked only with

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232. NCPI 4-4(a)3b(2).

the permission of the offended employee.[233] These directed changes were because of lack of legal basis, and not because of poor judgment on the agency head's part.

To alleviate these problems, the Order should be modified to allow questionable matters to be discussed regardless of regulation. Most of those matters that are non-negotiable will not be brought up, anyway. Union officials are knowledgable and will soon realize what is and is not negotiable that is not already known. For the most part, those points that will be bargained for and that management thinks should not be will be borderline. In the event a deadlock is reached over what is negotiable, consideration first should be given to holding an informal conference at the Washington level between the agency or department officials and the officials of the international union involved. If this fails, an impartial arbitrator should be agreed upon between the parties, possibly from the Federal Mediation and Conciliation Service list, or from a centralized board, as discussed in Chapter VIII, and the decisions therefrom should be binding on the parties. There should be no advisory arbitration. Further, a central administrative body should be created to give uniformity throughout the system,

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233. OIR Notice 12721 (1963).

which would avoid the necessity of various agencies and unions having to arbitrate the same problems more than once.

It appears to the writer that the area of bargaining even as the Order now stands is extensive. There are many areas that can still be negotiated. It would not be surprising to see wages bargained for. The minimum wage is set by law, but the maximum is dependent on wage survey boards. There is no prohibition against such bargaining. The field is wide open and both the agency and union can be hurt if they do not negotiate these contracts with care. Both parties must use skilled people in bargaining. This will be accomplished when it is realized that labor relations is a problem and skilled and specially trained personnel are necessary to accomplish the purpose of the program. The closing of one's eyes to reality is going to solve no problems, but, to the contrary, create them.

CHAPTER VIII

REMEDIES FOR IMPROPER LABOR PRACTICES

Many rights have been afforded employees by 10988 as extended by the Code of Fair Labor Practices. Management is prohibited from refusing to consult, bargain or negotiate when directed by 10988,[234] from failing to recognize appropriate units, and must meet all other requirements set forth in 10988.[235] The employee organization itself is prohibited by the Code from interfering with employee rights,[236] or disciplining employees for the purpose of hindering the performance of duty for the United States; from striking, or discrimination as to membership because of race, creed, or color.[237] With the above rights, which of course are not inclusive, the picture looks quite rosy. The question here is what can be done if the agency or the organization refuses to comply.

As has been discussed previously, there is an appeal under Section 11 of the Order on unit determination and voting controversies in the form of advisory arbitration. Grievances can be handled by prescribed agency grievance

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234. Code § 3.2.
235. Executive Order 10988 § 1(a).
236. Code § 3.2.
237. Ibid.

procedure,[238] and strikes by appropriate established legal doctrine.[239] What of the rest? It is desired that controversies be settled by negotiation between the parties.[240] If this cannot be accomplished, the agency must establish by regulation "a fair and adequate procedure for . . . processing complaints."[241] The investigation and processing of the complaint is made only after the agency determines there is a "substantial basis for a complaint."[242] The hearing is conducted by an officer and board appointed by the agency. The agency acts on the board's recommendation and its action is final.[243] If the employee organization is found to be at fault and will not take corrective action, the agency may summarily revoke its recognition, and there is no appeal or provision to consult any other government agency, including the Secretary of Labor.[244]

There can be little question but that the relationship between the union and the agency is one-sided. The situation parallels a tort judgment with the defendant

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238. Code § 3.3(a)1.
239. Code § 3.3.
240. Code § 3.3(a)1.
241. Code § 3.3(a)2.
242. Ibid.
243. Code § 3.4.
244. Code §. 3.4(a).

having no funds. Although I personally believe that ninety-nine out of one hundred decisions made by government agencies in such matters would be made correctly and without any partiality because of the agency-installation relationship,[245] it is unrealistic to assume employee organizations will ever have such an outlook. To them the agency has all the aces. It is a psychological problem in that the unions think they have no chance of getting a fair decision because the agency has final determination as to whether an alleged unfair labor practice will be heard. Further, the right to summarily take away recognition if union errors are not corrected is not conducive to free bargaining between the parties.

This procedure, in the opinion of the writer, is the most dangerous impediment the success of the Order faces. As discussed previously, labor practice under NLRA and 10988 cannot and will not ever be the same, but it cannot be completely one-sided if it is to work. If we must have unions in government, we must be realistic and have the proper relationship.

The best solution to this problem would be to amend 10988 so as to allow a centralized board of three persons

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245. Cf. 52 Geo. L. J. 420 at 446.

to hear all disputes as to unfair labor practices. This would not endanger the defense effort, as the board would still have to stay within the bounds of the Order. To further protect the defense establishment in cases from agencies within the Department of Defense, the board should consist of a civilian from the Department of Defense, a military lawyer, and one other.

Another solution might be to make provision for arbitrators under Section 11 to hear and make final decisions in such cases subject to veto by the Secretary of Defense. This is not considered as desirable as it would not provide as much uniformity and would leave the final outcome in the hands of one man.

Regardless of the solution, one must be found or the government labor relations program will be for naught.

CHAPTER IX

CONCLUSION

Executive Order 10988 has been in practical effect for about thirty months and its impact is being felt. It is too early to draw final conclusions, but certain evaluations can be made.

Upon first considering the problem, it might appear that labor gained nothing from 10988 because of its lack of teeth in comparison with the NLRA. The lack of ability to arbitrate to determine negotiable issues, and the retention in the agency of the right to decide what issues may be negotiated, make it appear no real right to bargain exists. At the most, it would seem that labor has been adorned with some status symbol but has been given no real role. One asks why, then, did labor indorse such a program, which they did with such vigor?[246] The answer is labor had no standing with the government, as a matter of right, before 10988, and anything was an improvement. Labor has gained the right to talk on an official basis with management. It was worth not taking a chance on having the Order not executed to not have all labor wanted in it. This should not be

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246. Task Force Rep.

interpreted as weakness on labor's part, as it was expedient at the time. The idea that union leadership was or ever will be satisfied with 10988 as it stands would be unrealistic. Already labor is complaining.[247] The honeymoon period is over.

Government management has been suddenly confronted with an entirely new concept of relations with its labor force. Like anything new, it will take time to work out acceptable procedures and to properly train personnel to act in the labor-management sphere on this different level. The realization that labor relations as practiced with the unions is a quasi legal management-labor problem must be met. The solution is not to act in a haphazard nature, but one of thought, intelligence and non-emotion. The problem will not go away and is going to become more complex.

It is predicted that the 60 percent rule will be abolished. The present system is one-sided and creates inequities. A reasonable solution is to allow recognition if a majority of those in the unit who vote for recognition, but to have an appeal available if the election is not considered representative. In addition,

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247. Rep. of Officers of AFL-CIO Metal Trades Dep't 51st Convention, N.Y., N.Y. (Nov. 1963), GERR 10 C-1 (1963).

management should have its gag removed to enable it to express its opinion to the employees. This does not envision criticism of the union management, but only allowing management's position to be explained.

Arbitration of negotiation impasses on what can be bargained for will be allowed. This is necessary to ensure that such problems will at least be discussed. A suggested solution to this problem is to create a body similar to the NLRB. This body should encompass all government agencies as opposed to each department having its own.

The composition of the board should consist of three persons: one permanent member appointed by the President, one lawyer from the department concerned, and one civilian from the department concerned. In those cases from the Department of Defense, the attorney should be from the uniformed services. In addition to the permanent president there should be a permanent clerk and counsel for the board. The board would sit on the call of the president. The board would have jurisdiction to:

(1) Issue uniform regulations applicable to all federal agencies. This would allow uniform implementation of 10988.

(2) Make decisions on violations of the provisions of 10988, and the Standards and Code.

(3) Appoint arbitrators from a panel to be created:

(a) To determine when a subject is or is not negotiable;

(b) To determine unit determinations; and

(c) To supervise elections and determine election controversies.

There would be no advisory opinions and precedent could be established. Uniformity, which is lacking at the present time, should result. The agency and union would pick their arbitrator from a group submitted. This would tend to make the decision more palatable, as the arbitrator would be the selection of both union and management. The present Section 11 arbitrations would be dealt with in the same manner by this body. These remedies would assure the union that they were not at the mercy of the agency as to what can be discussed.

It will be accepted practice to have provisions in contracts allowing arbitration rendering final decisions in grievance cases. Unit controversies will not hold the limelight, as they have been, as the pattern of decisions becomes more pronounced. The attitude toward rigidity of agency regulation will lessen. An extension of the contract bar as concerns unit controversies under

Section 11 from the present twelve months[248] to twenty-four months[249] or perhaps thirty-six months, as NLRB now requires,[250] will take place.

From the above discussed predicted changes there can be no question but that labor-management relations in the government will expand, with labor having more influence. More responsibility will be generated for government managers requiring more specialized training. Management now has to deal with the unions, and this fact must be accepted as a major issue and not swept under the rug because of a lack of realization or as a necessary evil. Management must make an exerted effort to bargain in good faith and labor must not try to cram unreasonable concepts down management's throat. Both sides have an opportunity to make history, but it should be done with foresight and intelligence.

In conclusion, it must not be forgotten that it is desired that every effort be made to allow employee organizations to be heard by management,[251] and that the spirit of 10988 be complied with. The responsibility of

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248. DOD 1426.1 X (1964).
249. The Dep't of Labor recommends 24 months. GERR 29 A-1 (1964).
250. Pacific Coast Ass'n of Pulp and Paper Mfrs., 121 NLRB 990 (1958).
251. Fed. Personnel Manual ch. 711, 1(1)a /herein-after cited as FPM/.

accomplishing this is on each department and agency[252] of the government, as well as employee organization officials, and requires them to act with integrity and efficiency of public service and to protect the rights of individual employees.[253]

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252. Fed. Personnel Manual, ch. 711, 1(1)3 /herein-after cited as FPM/ defines an agency as: "Any federal department or agency in the executive branch of the government to which the employee-management cooperation program applies."

253. FPM, ch. 711, 1(1) 1a(b).

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